U.S. COMMISSION ON CIVIL RIGHTS

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BUSINESS MEETING AND BRIEFING

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FRIDAY, DECEMBER 16, 2005

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The Commission convened at 9:00 a.m in the Rayburn House Office Building, Room 2226, Washington, D.C., GERALD A. REYNOLDS, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman
ABIGAIL THERNSTROM, Vice Chairman
JENNIFER C. BRACERAS, Commissioner (via telephone)
PETER N. KIRSANOW, Commissioner (via telephone)
ARLAN D. MELENDEZ, Commissioner (via telephone)
MICHAEL YAKI, Commissioner
KENNETH L. MARCUS, Staff Director

STAFF PRESENT:

RACHELLE BRACEY
TERESA BROOKS
CHRISTOPHER BYRNES
DEBRA CARR, Esq., Associate Deputy Staff Director
TERRI DICKERSON, Assistant Staff Director
PAMELA A. DUNSTON, Chief, Administrative Services and Clearinghouse Division
SETH JAFFE
SOCK FOON MacDOUGALL
EMMA MONROIG, Solicitor/Parliamentarian
BERNARD QUARTERMAN
EILEEN RUDERT
AUDREY WRIGHT
MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

CHRISTOPHER JENNINGS
LISA NEUDER
KIMBERLY SCHULD

I-N-D-E-X

P-R-O-C-E-E-D-I-N-G-S

(9:24 a.m.)

CHAIRMAN REYNOLDS: This meeting will come to order. This is a meeting with most of the commissioners participating by being present at the Rayburn House Office Building, room 2226, in Washington, D.C. Commissioners Braceras, Kirsanow, and Melendez will participate via telephone.

This meeting will continue until 10:00 a.m., when there will be a scheduled briefing on disparity studies as evidence of discrimination in federal contracting. If the business meeting has not concluded by the time the briefing is scheduled to start, then there will be a recess of the business meeting. And the same will be resumed after the briefing is concluded.

VICE CHAIRMAN THERNSTROM: Mr. Chairman, you forgot to mention that Commissioner Taylor is also absent.

CHAIRMAN REYNOLDS: Thank you, Abbie. That's correct.

Commissioner Taylor is absent. He is where he is supposed to be. His wife is expecting. The delivery is -- actually, he's probably a father once over as of now.

I. Approval of Agenda

CHAIRMAN REYNOLDS: In any event, we have lost some time due to technical difficulties. So I would like to move that we strip some items off of the agenda so that we don't bleed into the briefing. I would like to table discussion on the Arizona SAC report, the working group on SAC reform, the section on campus anti-semitism.

COMMISSIONER YAKI: Both items V and VI?

CHAIRMAN REYNOLDS: Yes. Okay.

VICE CHAIRMAN THERNSTROM: The Voting Act's briefing report? We're going to discuss that?

CHAIRMAN REYNOLDS: I'm sorry.

VICE CHAIRMAN THERNSTROM: The Voting Act's briefing report, are we going to discuss that?

CHAIRMAN REYNOLDS: Yes, yes.

COMMISSIONER YAKI: I'll move the amendment of the agenda.

CHAIRMAN REYNOLDS: Second?

COMMISSIONER MARCUS: Second.

CHAIRMAN REYNOLDS: Okay. Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor say "Aye."

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: All in opposition?

(No response.)

CHAIRMAN REYNOLDS: The motion passes unanimously. There will be a number of pregnant pauses while I get myself together.

II. Approval of Minutes of November 18, 2005 Meeting

CHAIRMAN REYNOLDS: Next up, may I have a motion to approve the minutes of the November 18th, 2005 meeting.

VICE CHAIRMAN THERNSTROM: So moved.

CHAIRMAN REYNOLDS: Is there a second?

COMMISSIONER YAKI: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor say "Aye."

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: All in opposition?

(No response.)

CHAIRMAN REYNOLDS: The motion passes unanimously.

III. Announcements

CHAIRMAN REYNOLDS: Okay. Next up we have one announcement, and it regards the passing of LeGree

Daniels. I'm saddened to announce the passing on November 19th of LeGree Daniels, a federal civil rights official in the Reagan, Bush, and Clinton administrations.

President Ronald Reagan appointed her Assistant Secretary of Civil Rights at the Department of Education in 1987, a position which she held for 2 years.

In 1999, President George H. W. Bush appointed Ms. Daniels to the Postal Service Board of Governors. President Bill Clinton reappointed her to the board in 1999. And she remained a member until her death.

Ms. Daniels' long record of service to this country, her important work in the area of civil rights, and the admirable manner in the way in which she carried out her duties should be an example for future generations.

Would any of the commissioners want to make a comment on her passing?

(No response.)

CHAIRMAN REYNOLDS: Okay. Let's see. There's a motion to delay for one month the implementation of GAO recommendations. And what I will do, I will read the motion into the record.

"I move that the Commission extend by one month to mid February 2006 the implementation of the GAO and OPM recommendations contained in the reports issued from 1997" -- I'm sorry?

COMMISSIONER YAKI: Was that in our package?

CHAIRMAN REYNOLDS: Okay. I'll start from the top. "I move that the Commission extend by one month to mid February 2006 the implementation of the GAO and OPM recommendations contained in the reports issued from 1997 through April 6 of 2005. I so move to accommodate the House Judiciary Committee's request that the Commission submit a revised draft strategic plan to the Judiciary Committee staff on December 12th." I assume that that has already occurred.

"The Commission is currently awaiting comments from the Committee. And in order to give appropriate time for congressional comment, the Commission will not be able to vote on a new strategic plan until the January 20th Commission meeting at the earliest.

"After implementation of the new strategic plan, it will take at least one month to implement the GAO and OPM recommendations. In the event that cooperation with Congress should require any further

extensions, we ask that the staff director keep us apprised."

Is there a second?

COMMISSIONER BRACERAS: Second.

CHAIRMAN REYNOLDS: Thank you. Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor please say "Aye."

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: Any in opposition?

(No response.)

CHAIRMAN REYNOLDS: The motion passes unanimously.

Okay. Although the temporary provisions of the Voting Rights Act are set to expire in August of 2007, the leadership in the House of Representatives --

COMMISSIONER BRACERAS: I'm sorry. Excuse me. This is Braceras. You're bleeping in and out.

CHAIRMAN REYNOLDS: Okay. Can you hear me now?

COMMISSIONER BRACERAS: Much better.

IV. Program Planning

CHAIRMAN REYNOLDS: Okay. Sounds like a

commercial.

Although the temporary provisions of the Voting Rights Act are set to expire in August of 2007, the leadership in the House of Representatives is now pushing to reauthorize the entire act this year.

The House has already held several oversight hearings on various provisions of the act during the Summer and Fall of 2005. In order to fulfill our statutory responsibility, we must issue findings and recommendations to Congress in a timely manner so that members of Congress may act on them.

I'll read the motion into the record, "I move to amend the scope of the work to be performed for the Commission's previously approved for year 2006 national report on reauthorization of the temporary provisions of the Voting Rights Act.

"specifically, I move to eliminate the work formerly assigned to the Office of Civil Rights Evaluation under the previously approved scope of this project. This limitation is necessary to ensure that the Commission can submit timely findings and recommendations to Congress since Congress has expedited the reauthorization of the Voting Rights Act.

"The motion will not affect the work that

has been completed by the Office of General Counsel for the report, namely a study of the Department of Justice's enforcement of the act's section 5 pre-clearance requirement and the language provisions of section 203 and section 204."

Is there a second?

VICE CHAIRMAN THERNSTROM: Second.

CHAIRMAN REYNOLDS: Discussion?

COMMISSIONER YAKI: I have discussion, Mr. Chair. Could we get someone from OCRE or staff to explain what we would be omitting in this revised scope of report?

CHAIRMAN REYNOLDS: Sure. Ms. Dickerson, would you care to address this issue?

COMMISSIONER MARCUS: Let me begin as Ms. Dickerson is coming here. By way of general background, the previously approved scope of the statutory report would have included both a legal portion provided by the Office of General Counsel through a contractor, which was a report worked on during the last fiscal year together with additional analysis by the Office of Civil Rights Evaluation on LEP and disability issues to be done during this fiscal year.

Ms. Dickerson, did you want to elaborate

on the work within the scope on LEP or disability at all?

CHAIRMAN REYNOLDS: Okay. Well, I have a question for you. Is it possible to include the work on LEP and disabilities issues within that time frame?

MS. DICKERSON: No, not the revised time frame that I'm understanding you to say.

CHAIRMAN REYNOLDS: Okay. Commissioner Yaki, did you have some specific questions?

COMMISSIONER YAKI: My question is directed at the director of OCRE. What kind of data or findings will we not be privy to by nature of the revised scope in terms of the LEP given that that goes through a major section of the VRE, the section 204 extension? In other words, what kind of work were you working on and now you will not be working on?

MS. DICKERSON: Oh, okay. I don't believe we would be able to include anything having to do with LEP or the disability issues at all. The whole framework and scope would only be limited to -- I guess it was referenced in a more minor way in the report that the contractor did. And the focus was really on section 5 for that report.

COMMISSIONER YAKI: Well, what I am asking, though, is what was it that you were going to

be looking at in terms of LEP and disability in terms of the section 204 analysis? What kind of data was being gathered? What kind of research were you going to be looking at?

MS. DICKERSON: We were going to prepare interrogatories and request data on complaints, the nature of the complaints, you know, how they had been handled, how many had been resolved, whether they were pending, and to look at those, the complaints over time, for example, We were also going to update some of the -- the contractor's report I think went up to the year 2004. So we would have asked them for the more recent data as well to bring it up to current.

COMMISSIONER YAKI: Was there any section 5 part of the OCRE -- was there any jurisdiction over section 5 of the report that your office had or was it only on 204?

MS. DICKERSON: In the original concept, we were going to use the contractor's work for the section 5 analysis. We might have just asked for the data that was indicated between 2004 to date.

But no. Our focus was on the other parts.

COMMISSIONER YAKI: Will the contractor's data on section 5 be able to be included in the revised schedule?

COMMISSIONER MARCUS: Yes. All of the contractor's work could be included under this proposal. Let me also say about clarification that the contractor's work wasn't limited to section 5 and also did include some work on LEP issues in other sections as well.

COMMISSIONER YAKI: Well, I mean, thank you. I just want to express my personal concern as a commissioner from some ethnic background that where we have 204 issues in California on language, whether it's languages for folks from Asian backgrounds or from Latino backgrounds, I think I would be very disappointed if our report to the Congress was not comprehensive on those issues.

I understand the time line that we are under. I do not want, however, the Congress to think that we are giving 204 and the underlying data in the short trip in the analysis.

That is my concern about the revision, but I understand the need to make it relevant in terms of timeliness. I just don't know if I will be able to, I will personally be able to, support it.

CHAIRMAN REYNOLDS: Commissioner Thernstrom?

VICE CHAIRMAN THERNSTROM: Well, I very

much appreciate what Commissioner Yaki has said, but the fact is that the issue that is really on the table in congressional debate is the extension and amendment, potential amendment, to section 5.

I do not believe at the end of the day there will be any real debate on the language assistance provisions. They will be extended.

MS. DICKERSON: Can I just correct something I said?

CHAIRMAN REYNOLDS: Oh, sure.

MS. DICKERSON: The disability section was never within the scope of the project because those provisions aren't expanded. So we were going to do the section 203 analysis and also the section that relates to election monitors.

VICE CHAIRMAN THERNSTROM: And I don't think either of them really is in danger of expiring.

COMMISSIONER BRACERAS: I'm sorry. I can't hear the rest of you very well.

VICE CHAIRMAN THERNSTROM: I was simply saying that language provisions and the provision for federal monitors, neither of them are in danger of expiring. There may be one or two voices in the House of Representatives who will raise questions about the necessity of reauthorizing those provisions. But

basically they are off the table. It is section 5 and these potential amendments that are on the table.

And so those grounds I think confining ourselves to section 5, to the real issues, makes sense given the constraints that we're operating under.

COMMISSIONER MARCUS: And I want to make sure that it's clear that under the Chairman's motion, we would not be stripping out all discussion of the limited English proficiency issues. Rather, we would be focusing on the analysis of LEP issues before the Department of Justice, which was already prepared by the contractor, and trying to provide that on an expedited time frame so that it can be available to Congress while Congress is still considering the issue.

So there still will be information on that area. It's true there will be less of it, but it's hoped that it will be more timely and, therefore, more useful.

COMMISSIONER YAKI: This is Commissioner Yaki.

I understand what both the Vice Chair and the Staff Director have said. I believe that this motion is going to pass. So I will be looking very

closely at our discussions on 203 and 204.

I just want to reiterate, however, that -- and the election-monitoring section as well. If I could have a dollar for every time I thought there was a surety about what Congress was going to do on a particular item, I would not be worried about turning in my time sheets for the Commission.

So, with that, why don't we just move to a vote. I will probably abstain from this, but we will look forward to working with the staff, the Staff Director, and the fellow commissioners on the production of the final report in a constructive and positive manner.

CHAIRMAN REYNOLDS: Is there a second?

VICE CHAIRMAN THERNSTROM: Second.

COMMISSIONER MELENDEZ: Can I ask a question?

CHAIRMAN REYNOLDS: Yes, Commissioner Melendez?

COMMISSIONER MELENDEZ: This is Commissioner Melendez.

On the temporary provisions of the Voting Rights Act, which I received a draft, at what point does that become final? Because on page 53, it had something to do with a statement of the commissioners.

Is that something that a statement by any of the commissioners can be added in to this exception or any of those 203 --

COMMISSIONER MARCUS: Yes, Commissioner Melendez. I believe that the document that you are referring to is most likely a report prepared by the contractor to the Commission, which was intended to provide material which could be then used in our final report.

COMMISSIONER BRACERAS: Wait a minute. Sorry. This is Braceras.

I think Commissioner Melendez may be getting confused with the briefing summary.

COMMISSIONER MELENDEZ: Yes.

COMMISSIONER MARCUS: Oh, that could be.

COMMISSIONER MELENDEZ: The briefing summary that I received. I just wanted to make sure that that wasn't a final document until --

COMMISSIONER MARCUS: Neither of those two documents is considered a final document. In both cases, we're going to recommend that the commissioners be given until the end of the year to provide comments on either of those two Voting Rights Act documents.

COMMISSIONER MELENDEZ: Okay. Thank you. That's all. I wanted clarification. Thank you.

CHAIRMAN REYNOLDS: Okay. May I have a second?

COMMISSIONER BRACERAS: Second.

CHAIRMAN REYNOLDS: Okay. All in favor please say "Aye."

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: All in opposition?

(No response.)

CHAIRMAN REYNOLDS: Any commissioners abstain?

(Whereupon, there was a show of a hand.)

CHAIRMAN REYNOLDS: Okay. Let the record reflect that Commissioner Yaki abstains. The remaining commissioners voted in favor of the motion. The motion passes.

COMMISSIONER YAKI: Is that it?

CHAIRMAN REYNOLDS: Yes. Well, for that piece. Okay. I'm going to read the next motion into the record. "I move that commissioners submit comments, suggestions, and revisions on the work already performed by the Office of General Counsel on the previously approved 2006 national report on reauthorization of the temporary provisions of the Voting Rights Act to the Office of Staff Director by close of business Friday, December 30th, 2005.

"I also move that the Office of Staff Director prepare a revised report incorporating these comments, suggestions, and revisions for submission to commissioners on Monday, January 9th, 2006."

Is there a second?

VICE CHAIRMAN THERNSTROM: I second it.

COMMISSIONER BRACERAS: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor please say "Aye."

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: Any opposition?

(No response.)

CHAIRMAN REYNOLDS: Any abstentions?

(No response.)

CHAIRMAN REYNOLDS: The motion carries unanimously.

(Pause.)

V. Future Briefings

CHAIRMAN REYNOLDS: This is that pregnant pause that I referred to earlier.

Okay. I'm going to read the next motion into the record. "I move that the staff conduct a briefing on the use of racial categories in the 2010

census on Friday, March 10, 2006. The briefing will be based on the concept paper distributed on Friday, December 9, 2005."

Is there a second?

VICE CHAIRMAN THERNSTROM: I second it.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor say "Aye."

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: All in opposition?

(No response.)

CHAIRMAN REYNOLDS: Any abstentions?

(No response.)

CHAIRMAN REYNOLDS: The motion passes unanimously.

Okay. At this point I would like to adjourn the meeting. We have 15 minutes. And then we'll start the briefing.

VICE CHAIRMAN THERNSTROM: And is there possibility we will solve this technical problem before the briefing?

CHAIRMAN REYNOLDS: I have no idea. I doubt it, though.

COMMISSIONER MARCUS: We'll certainly look

into it during the recess.

COMMISSIONER YAKI: Good-bye.

(Whereupon, the foregoing matter went off the record at 9:46 a.m. and went back on the record at 9:58 a.m.)

CHAIRMAN REYNOLDS: We can get started now.

VI. Commission Briefing: Disparity Studies

- Introductory Remarks by Chairman

CHAIRMAN REYNOLDS: On behalf of the Commission on Civil Rights, I welcome everyone to this briefing on disparity studies as evidence of discrimination in federal contracting. The Commission frequently arranges such public briefings with presentations from experts outside the agency in order to inform itself of the nation's civil rights situations and issues.

In Adarand v. Pena, opinion of the Supreme Court, quoting Richmond v. Croson, reaffirmed that absent a searching judicial inquiry on the justification for race-based measures, benign or remedial classifications motivated by illegitimate notions of racial inferiority or simple racial politics. Well, you can't tell.

The court went on to hold that federal

programs that use racial classifications are subject to strict scrutiny. Although the court has not provided clear guidance on the contours of the strict scrutiny standard, it is clear that federal agencies that use racial classifications must demonstrated that the classification is needed to remedy the effects of discriminatory conduct.

In order to comply with this constitutional requirement, federal and state agencies and contractors have commissioned disparity studies to demonstrate discrimination for a statistical analysis that showed under-representation of minorities or women among the federal contractors.

After Adarand, three efforts, a 1996 appendix to the Department of Justice guidance, a 1997 Urban Institute report, and 1998 and 1999 benchmark studies from the Department of Commerce, were compiled for evidence of discrimination in federal contracting using disparity studies and other sources.

Yet, critics of the efforts point to stale data, a lack of documentation of data sources, and fluent analytical methods, a failure to develop meaningful industry groupings for a study of federal contracting, and a lack of a theory of discrimination.

Today the Commission is seeking

information on the methodological and empirical strength of these and other disparity studies conducted since 1995.

We are pleased to welcome four experts to comment on the quality of current disparity studies. We have Dr. Ian Ayres of Yale Law School. Dr. Ayres was one of the consultants who designed the Department of Commerce's benchmark study.

An expert witness on many affirmative action contracting cases, he has published widely on racial discrimination and the need for affirmative action. His most recent empirical study includes forthcoming articles in the Yale Law Journal and Stanford Law Review on racial disparities in taxicab tipping and the effects of affirmative action on the number of black lawyers. Professor Ayres has earned a J.D. from Yale and a Ph.D. in economics from M.I.T.

Taught at the law schools of several major universities, he served as a research fellow of the American Bar Foundation and comments regularly on Public Radio's "Marketplace" and in Forbes Magazine and, finally, the New York Times.

We also have George LaNoue. Dr. LaNoue analyzes minority business programs, consults with state and local officials on disparity studies, and

has written guide books on how to conduct such studies and continues to serve as a trial expert on civil rights cases in federal courts. He has published four books and numerous articles, including five law review articles on post-Croson law.

Dr. LaNoue is a professor of political science at the University of Maryland at Baltimore, where he directed the public policy graduate program for 18 years.

In addition to teaching at several major universities in the United States, Dr. LaNoue has had the opportunity to conduct research and lecture in 15 countries.

Next up we'll have Dr. Constance Citro. She has headed the Committee on National Statistics of the National Academy of Sciences since May of 2004 and served as study director for their newly released "Evaluation of Disparities in Federal Contracting with Women-Owned Businesses."

Formerly, Dr. Citro was the Vice President and Deputy Director of Mathematical Policy Research, Inc. She is a Fellow of the American Statistical Association. Between 1984 and 2004, she directed numerous projects reviewing the 2000 census, poverty estimates, disentail census, and survey methodology,

and social welfare program models.

Her research has focused on the quality and accessibility of large, complex data sets and the measurements of income and poverty. Her Ph.D. in political science is from Yale University.

Finally, we have Roger Clegg. He's our final speaker. He is Vice President and General Counsel for the Center for Equal Opportunity, a research and educational organization based in nearby Virginia that specializes in civil rights, immigration, and bilingual education issues.

Mr. Clegg writes, speaks, and conducts research on legal issues arising from civil rights laws. He is a contributing editor at National Review Online and writes frequently for newspapers and law journals.

Mr. Clegg has held several positions in the U.S. Department of Justice from 1982 and 1993, including Assistant to the Solicitor General, and also the second highest ranking position in the Civil Rights Division.

Later he served as the Vice President and General Counsel for the National Legal Center for Public Interest, which produces publications on legal issues affecting businesses. He is a graduate of Rice

University and Yale Law School.

Our panelists have wonderful credentials and experience in this area. And we look forward to a rich discussion on these topics. First up we have Dr. Ayres.

- Speakers' Presentations

DR. AYRES: Good morning. I support the requirement that race-conscious government programs be strictly scrutinized. Courts should demand rigorous and persuasive evidence and compelling governmental interest and that race-conscious means be narrowly tailored to further that compelling interest.

My central claim here today is that quantitative methods exist and have already been used to provide this kind of evidence. The Commerce Department's disparity study is a case in point. The results of this study created a red light/green light system which turned off the use of bidding credits, where there was not evidence of under-utilization of minority contractors. But it's my opinion that the evidence of discrimination in the green lighted industries is both rigorous and sufficiently persuasive to make out at least a prima facie case of narrow tailoring.

We should guard against efforts to turn

the narrow tailoring requirement into a burden that no government defendant could ever meet to remedy discrimination. Justice O'Connor was quite clear that the requirement of strict scrutiny was not a subterfuge to create a fatal, in fact, requirement.

Indeed, the Supreme Court's recent willingness to accept the narrow tailoring evidence of the University of Michigan Law School is strong evidence that cutting-edge quantitative disparity studies, such as the one produced by the Commerce Department passed constitutional muster.

In the Michigan case, the Supreme Court required almost no statistical evidence that the law school used the minimum racial preference necessary to achieve its compelling interest, but the Supreme Court, nonetheless, was willing to sign off on the constitutionality of that affirmative action program. The best procurement disparity studies already provide much more persuasive narrow tailoring evidence a fortiori more clearly constitutional.

In the remainder of this statement, I will analyze three things: number one, the evidence supporting the government's compelling interest in remedying discrimination; two, the most persuasive methodologies for estimating disparity benchmarks;

and, three, a comparison of the narrow tailoring evidence and procurement in educational admissions.

Number one, there is credible evidence of a compelling governmental interest. No one disputes the fact that remedying discrimination is a compelling governmental interest. And there is abundant statistical evidence of that that discrimination is not a thing of the past.

Many commentators have argued, however, that government can only use race-conscious affirmative action to remedy its own discrimination, but this idea was flatly rejected by Justice O'Connor.

In Croson, Justice O'Connor in a plurality opinion joined by Chief Justice Rehnquist and Justice White concluded that the City of Richmond -- and here I quote -- "can use its spending power to remedy private discrimination if it identifies that discrimination with the particularity required by the Fourteenth Amendment."

While government discrimination against minority contractors in procurement markets may be a thing of the past, the same cannot be said of private discrimination. Credible evidence of private discrimination by both input suppliers to and customers of minority contractors provides a

persuasive basis for government to use its spending powers to remedy private discrimination.

Discrimination is predominantly practiced today in private markets. Government has a compelling interest to try to remedy it. Narrow tailoring, of course, requires the use of race-neutral methods, such as simply prohibiting discrimination whenever possible, but a great deal of private discrimination will necessarily fall below the radar screen of the law.

Discrimination that cannot be proven in individual cases can often be identified in the aggregate. We should guard against requiring microeconomic tests of disparate treatment as evidence for discrimination in a macroeconomic setting.

Point number two, there are persuasive statistical methods for calculating disparity benchmarks. The crucial and most disputed element of any disparity study is calculating the benchmark. This is sometimes referred to as the minority availability percentage.

The benchmark attempts to measure the market and share of percentage of business that minority firms would receive in a world without discrimination. The benchmark is crucial to

establish: number one, whether minorities face discrimination; and, number two, whether the proposed racial preferences are sufficiently limited so as to only remedy the discrimination, not to overshoot.

For example, in a particular market, if a disparity study persuasively concludes that in the absence of discrimination, minority contractors would have received ten percent of the contracts but we observed that minority firms are only receiving four percent of the contracts, then the shortfall in utilization is evidence of discrimination.

Under-utilization evidence of this kind is, thus, probative of the compelling interest prong of strict scrutiny, but the benchmark is also crucial in testing whether an affirmative action program is narrowly tailored.

So the crucial question in disparity studies is to develop the credible methodology to estimate this benchmark's share of contracts minorities would receive in the absence of discrimination.

The touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. Early disparity studies attempted to calculate benchmarks on

a very crude head-counting methodology.

If minorities were X percent of the general population, then under this theory, courts would assume that, absent discrimination, they would be awarded X percent of the procurement dollars. Increasingly, however, courts rejected mere head counting and moved toward a qualified-firm counting approach.

The qualified-firm counting approach requires courts to identify the pool of firms which are qualified in the sense of being ready, willing, and able to do business with the government.

While this qualified-firm counting approach represented a substantial advance over the cruder head-counting approach, it suffered from the problem that qualified firms may have substantially different capacities.

Firm A and B may both be qualified to do some business with the government, but one firm may be a multinational with many plans while the other firm may be a sole proprietorship with only a single plant.

The qualified-firm counting approach ignored differences in capacity and deemed single-plant firms to be equally available to serve the government as a multi-plant firm.

The Commerce Department's approach for estimating the minority benchmark was far more sophisticated than either the head-counting or the qualified-firm counting approaches.

This methodology, which I will refer to as the capacity approach, calculated in dollar terms the capacity of qualified firms to do business with the government. This approach more reasonably assumes that if SDBs control X percent of an industry's capacity, then, absent discrimination, they would be awarded X percent of the industry's procurement dollars.

Unlike the qualified-firm counting approach, the capacity approach would not find that manufacturers in a small micro brewery brand and Budweiser were equally available but, instead, would likely find that Anheuser-Busch is more available in the straightforward sense that it has a larger capacity.

The Commerce Department's capacity methodology is particularly conservative because it did not attempt to calculate how much greater minority capacity might have been but for discrimination. A so-called "but for" adjustment would raise the benchmark percentage by which utilization is judged.

The methodology, instead, took minority capacity as it found it. It, thus, made no attempt to remedy historical discrimination or even present discrimination by input suppliers and customers that, predictably, would depress the capacity of minority firms to supply government contracts.

Like Justice O'Connor, I strongly support a requirement to government justifying race-conscious policies by providing persuasive evidence that the policies are narrowly tailored to promote a compelling government interest.

The Commerce Department's disparity studies are rigorous and provide credible prima facie evidence of both discrimination and the potential for narrowly tailored race-conscious remedies. As the Chair began, critics have pointed to the staleness of the data.

It's striking to me that the Commerce Department has not seen fit to update its benchmark analysis since 1999. I worry that the present administration is trying to achieve a back-door sun setting of remedial race-conscious programs by fostering the increasing destitude of the necessary narrow tailoring evidence. Regardless of how one feels about affirmative action, we should mend and not

end disparity studies.

Finally, the constitutionality of race-conscious affirmative action in education admission strengthens the differences that the Commerce Department disparity study provide credible evidence.

While the narrow tailoring requirement has always had multiple dimensions, the central meaning has been that government use only the minimum racial preference necessary to achieve its compelling interest. But the truth is that the Supreme Court's Grutter decision required virtually no evidence that the law school use the minimum preference necessary.

Now that the Supreme Court has signaled its willingness to support more flexible modes of proof in educational affirmative action, it would be bizarre for it to strike down much more rigorous narrow tailoring evidence and procurement.

In conclusion, it has been a great honor to have the opportunity to speak to this Commission that has played such a remarkable role in this nation's struggle to secure quality for all its citizens.

In reading the other panelists' prepared statements, I do think there is some substantial

agreement that we all support the requirement of rigorous, robust, validated disparity studies. I also support the comments that the disparity studies should be as transparent as possible. We may disagree, though, on whether they can and should be done.

Thank you for giving me this opportunity to speak.

CHAIRMAN REYNOLDS: Thank you, Professor Ayres.

Dr. Citro?

DR. CITRO: Thank you.

I appreciate very much the opportunity to appear at this briefing. As you noted, I have been Director since May 2004 of the Committee on National Statistics, which is a standing committee at the National Academy of Sciences. And I have worked at the committee for over 20 years, principally as a senior study director.

My remarks are based largely on my experience as study director for a Committee on National Statistics project that looked at the utilization of women-owned businesses in federal contracting. The study was commissioned by the U.S. Small Business Administration. We were asked to review relevant data and methods.

We published our report in March 2005. I have provided copies to the members of the Commission, and there are a few additional copies. It's also available on the Web.

My remarks are also informed by my work with a Committee on National Statistics panel on methods and data for measuring racial discrimination. It issued its report in February 2004. I only have one copy here. It's quite a substantial document to carry around.

My remarks are about data and methods. I leave it to others to draw the conclusions about the relevance to the legal situation. I briefly talk about and expanded on in my written remarks definitions, methodological issues for disparity studies, the pros and cons of the specific studies that our project looked at, which included the Urban Institute meta analysis, the benchmark studies by the Department of Commerce, and a preliminary SBA study that was completed in 2002.

All right. One has to start with definitions, which in this case the critical concepts are disparity, which is simply a difference between two groups on an outcome of interest, and discrimination, for which there is a long history of

the definition of both disparate treatment and disparate effect discrimination.

Now, one would expect discrimination to result in an observable disparity, but a particular measured disparity does not necessarily imply discrimination. It may be due to any number of factors. But you have to start somewhere. And obviously starting to determine if you have measurable disparities seems the sensible obvious thing to do.

Our report reviews in detail various measurement and methodological issues for disparity studies. And I want to just comment on a few here.

The most common disparity measure that has been used is something called a disparity ratio. It has a numerator and a denominator. The numerator has to do with utilization. You look, for instance, at whether women or minority-owned businesses, the share that they may have of contracts or contract dollars.

The denominator is the availability share, which is some measure of what is the pool that is out there that one could reasonably expect to be available for contracting.

If dividing the numerator by the denominator you get a disparity ratio of one, then that means there is no disparity. The share of

contracts is commensurate with the share of the available pool. If it's less than one, then you have a measure that the share of contracts is not as great as the available pool.

Now, in the contracting arena, you would expect the availability share for a group such as women-owned small businesses to vary across industries and other characteristics of businesses. For this reason, it is critical to use disparity ratios broken down by meaningful categories and not just simple counts or percentages of utilization.

For instance, if industry A has ten percent women-owned small businesses and industry B only two percent, you really need to look at those separately, rather than just comparing the raw percentages of contracts.

Now, there are a number of issues involved in getting statistically defensible, valid, reliable disparity measures. And we discussed them at length in the report. I'll single out three.

One is that, for reasons that I have not been able to determine, most of the work in disparity measurement to date has compared apples and oranges in the numerator and the denominator. Most commonly, the numerator is a measure of contract dollars awarded to

a target group, such as women-owned small businesses.

Most commonly, the availability measure is some measure of numbers of businesses out in the general population, but businesses are very skewed in terms of their size distribution, in terms of revenues or gross sales or whatever you wanted to use. And so by comparing apples and oranges, one is distorting, one way or another, the disparity measure. One needs to have a commensurate measure. One also needs to actually look in our view at multiple measures.

The first speaker has emphasized that the key element of the disparity ratio that is really often in dispute is this availability measure. Who are you going to put in the category of ready, willing, and able? If you throw all businesses into the availability pool, you undoubtedly have too broad a pool as there are many businesses that don't care to do contracting or are not able to do so. On the other hand, if you have a very narrowly tailored requirement, why, then you are probably excluding firms that could be bidders.

Finally, the key issue -- and, again, many disparity studies have not met this standard -- has to do with validation, documentation, and transparency.

I will not go into the detailed evaluation

that we did conduct of the Urban Institute and the Department of Commerce and the SBA studies in my oral remarks. I've summarized that in my written remarks.

Let me just make some concluding observations. Again, disparity studies in my view are a reasonable first step to identify situations in which certain types of businesses could be disadvantaged in government contracting due to current or past discriminatory practices or behavior.

Observed disparities cannot establish by themselves discrimination nor the locus of any discrimination in time or space. For that, you have really got to move back into the process to look at various aspects of the contracting process or perhaps to look even further back in the causal chain by which pools of ready, willing, and able bidders are developed.

But you start with disparity studies. To be relevant and convincing, they must meet high standards for validity, reliability, and reproducibility.

In general terms, all data, methods, evaluations, and results must be thoroughly documented. More specifically, in constructing a disparity ratio, you need to use the same metric.

That's dollars or numbers; that's the apples and oranges problem.

You should use the same time period for utilization and availability because there's a lot of change going on in the composition of the business community. And if you've got data that are quite old for one aspect but not the other, you could be distorting things.

In addition, we urge that more than one type of disparity ratio should be calculated to determine if the story is the same or different depending on the measure used.

You should test the sensitivity of the results, the variations in methods and data, and the presence of outliers in the data. And you need careful evaluation to determine the best groupings of industries to use so that, for instance, you're not mixing a limousine service with Greyhound bus in determining your availability pool.

Finally, you really need explicit rationales for the availability measure of why you're going to define the pool of ready, willing, and able. And, again, results that show significant disparities for a target group, for a range of definitions of your pool of availability will be more compelling than if

you just pick out a single measure.

In terms of the specific studies, at this point, I see little point in attempting to try to replicate exactly the Department of Commerce benchmark procedure. And the principal reason is at least we were not able to find documentation of the methodology and any sensitivity analysis of the particular regression equations that were used to measure capacity, although the notion the department had of capability analysis, of trying to use some measures of payroll and years of experience is certainly something that is worth exploring.

The Urban Institute's meta analysis, the specific studies used, are very out of date and apply only to state and local government contracting in specific jurisdictions. But this study really, while not perfect, was a model of careful specification, sensitivity analysis, and thorough documentation.

The Urban Institute report actually provides the individual disparity studies. So one can do some variations on their analysis, which we did in our report.

We critiqued the SBA preliminary study and said it needed to go back to the drawing board. And my understanding is that that may be happening.

Finally, a research program on the contracting process in various industries and agencies that draws on case studies, administrative records, and statistical analysis could be very useful to inform government agencies not only of the possible role of discrimination but also of ways to improve the process for all types of businesses.

I am not sure where funding for such a program would come in this era, but I think that such a program, which would use disparity studies but would go much richer and deeper, could be very helpful in this arena.

Thank you so much for the opportunity to participate.

CHAIRMAN REYNOLDS: Thank you.

Next up Mr. Clegg.

MR. CLEGG: Me or Dr. LaNoue?

CHAIRMAN REYNOLDS: I'm just going to go down the line.

MR. CLEGG: Okay. Fine. Thank you very much, Mr. Chairman, for the opportunity to talk to the Commission today.

I agree with Professor Ayres that there is a lot of common ground among us on the issue of disparity studies. One part of the common ground is I

think everybody agrees that you have to be very careful in looking at statistical disparities and concluding that, therefore, there must be discrimination.

Someone very wise once wrote "Somebody can look at disparities and conclude that it is due to discrimination, but before you can do that, you have to perform an investigation because there are other factors that could explain these disparities. Disparities could be the result of discrimination or could be the result of something else that has no relation to discriminatory conduct." That, of course, is what you said, Mr. Chairman.

I think that the distinction between disparities, on the one hand, and discrimination, on the other, is a point that Dr. Citro makes in her written statement.

I also think that we all agree that before racial preferences can be used to remedy any discrimination that is actually found, that there has to be this finding of actual discrimination that needs to be very carefully done to make sure that the discrimination being required is closely related to the discrimination that is supposed being corrected and that, in addition, the use of preferences be

narrowly tailored and that an element of narrow tailoring is that there be no other way to correct the discrimination.

The Justice Department told the Supreme Court that a federal program may use race-conscious remedies only as a last resort where the effects of discrimination are stubborn, persistent, and incapable of eradication through race-neutral measures.

Professor Ayres in his written testimony said that if the government objectives, in this case remedying discrimination, could be fulfilled without the use of a racial preference, then no racial preference could be allowed.

What I would like to focus on in the remainder of my oral remarks is why it is that in the year 2005, it is extremely unlikely that, even if you were able to do a disparity study that made everybody happy in terms of actually identifying discrimination, as opposed to simply disparities, that it would not follow that racial preferences should be used to remedy the discrimination because of the fact that there are I think always going to be better ways to eliminate the discrimination than through more discrimination.

At every step of the contracting process,

it is clear that there are more narrowly tailored remedies than using racial preferences; for instance, if companies are being excluded from bidding because of unrealistic or irrational bonding or bundling requirements. And those requirements should be changed, but they should be changed for all companies, regardless of the skin color of the owner.

If the companies who could submit bids are not doing so, then the publication and other procedures used in soliciting bids should be opened up. But in opening them up, they should be opened up to all potential bidders, not just some.

And, finally, if it can be shown that the government bids are being denied to the lowest bidder because of the bidder's race, then there should be put in place safeguards to detect discrimination and sanctions to punish it. But, again, those safeguards and sanctions should protect all companies from racial discrimination, not just some.

One point of -- I'm not actually sure it's a point of disagreement, but I think a point that should be clarified is that not only does it not follow that if there is a disparity, there must be discrimination. It also doesn't follow that if there isn't a disparity, then there can't be discrimination.

For instance, Asians are over-represented in terms of the general population in acceptance to universities, but they are also discriminated against. So the mere fact that they are over-represented in universities doesn't prove that they haven't been discriminated against.

So you have to be very careful in using statistics either way. And if you're putting in place measures to fight discrimination, they should be protecting everyone from discrimination, even individuals who belong to groups that happen to be "over-represented."

Contracting is different I think than hiring, promoting, and even university admissions because in those instances, there's I think a larger irreducible and significant amount of subjectivity in the decision-making.

Contracting is an area -- I think Professor Ayres alluded to this -- where the process can be made very transparent and where this transparency should make it relatively easy to detect and correct discrimination.

Even if there could still be in theory a few cases of discrimination that go unremedied, which is always going to be the case -- there's always the

possibility that you might not be able to get, you know, the very last case of discrimination -- you have to ask yourself whether putting in place a regime that institutionalizes discrimination in the other direction is the appropriate and narrowly tailored and fair means to get rid of that last little bit of discrimination.

I would say, Mr. Chairman, that the study that the Commission recently published did a very good job of collecting and discussing the various race-neutral alternatives that are available to entities that want to correct contracting discrimination.

I want to say that my only criticism of the report is that it did not make it clear that the aim of the alternatives is to correct and end discrimination, not to achieve a particular percentage of contracting by this or that ethnic group because, as I think we have all agreed, you can't really conclude that there is a particular percentage that is necessarily going to be appropriate. Some groups may be over-represented and others under-represented for all kinds of reasons that have nothing to do with discrimination.

I should also say that these race-neutral

alternatives have been used very successfully in a variety of contexts, most recently in the State of New Jersey, where I think, principally as a result of a court order striking down that state's use of racial preferences, a system of race-neutral alternatives was put into place. And it's been quite successful.

And so, Mr. Chairman, I think that great care must be taken in preparing a disparity study to ensure that the evidence marshalled actually demonstrates discrimination. And I think that you're getting a lot of good advice today on how those disparity studies need to be done very carefully.

The thought that I want to leave you all with is that, even if a disparity study finally marshals evidence that is persuasive in its documentation of discrimination, it does not follow that the use of racial and ethnic preferences to correct that discrimination is justified, I think that, again, in the year 2005, there are always going to be better means to correct any discrimination than piling more discrimination on top.

Thank you very much.

CHAIRMAN REYNOLDS: Okay. Thank you, Mr. Clegg.

Next up we'll have Dr. LaNoue.

DR. LaNOUE: Thank you, Mr. Chairman. I thank the Commission for holding this hearing. It's an important subject. There's an enormous amount of money at stake, a huge number of government programs; and, equally important, a perception of race relations that is involved in creating accurate disparity studies.

I would add the only one thing to my background in 1989 after Richmond versus Croson, I created the project on civil rights and public contracts at the University of Maryland to function as a library and database of minority and women-owned business enterprise programs. Today it contains about 20,000 pages of materials, including more than 160 disparity studies. It's the largest publicly accessible collection anywhere. And that collection is available to the Commission if it wants to examine any documents or to do any research.

My written statement is 44 pages long, and thank you for indulging me on that. I'll only repeat some conclusions here, but I'll be happy to answer any questions about the report.

Discrimination is a poison in the bloodstream of American life. Understanding the role of disparity studies, that purport to examine

discrimination in public contracting is important for several reasons.

If done properly, disparity studies may be useful in highlighting the consequences of discrimination and providing information to eliminate them. If the studies are done improperly, however, it may create claims of discrimination that are false or misleading.

False claims of discrimination contribute to racial polarization and suppress interest in searching for race-neutral programs that may create genuine new opportunities.

Even at their best, disparity studies can rarely identify the source of discrimination with any precision and, thus, need to be supplemented with other data to create an appropriate public policy.

Let me talk a little bit about some of the general flaws in the -- I've read about 150 state and local disparity studies. There are probably 180 and in the 3 federal document concerned here.

I want to stress where I can where I hear agreement on the panel because I believe that is important. We come from different backgrounds, different methodological tools, different disciplinary perspectives, though I did note there is a lot of Yale

blue on this panel.

(Laughter.)

DR. LaNOUE: Let me talk about some --

COMMISSIONER YAKI: We're probably going to hear from Harvard on the disparity study.

DR. LaNOUE: I would welcome their participation.

VICE CHAIRMAN THERNSTROM: You didn't make your introduction. The introduction by the Chair didn't make it clear that your Ph.D. is from Yale.

DR. LaNOUE: That's true.

VICE CHAIRMAN THERNSTROM: So, to clarify, this is what we've got here.

DR. LaNOUE: Let me talk about some of the general flaws in disparity studies. While there are variations in method and the quality of disparity studies, all have some common flaws. Most all of them have some common flaws.

In their statistical sections, they fail to measure availability in the terms that Croson requires of comparing qualified, willing, and able businesses that perform similar public services. That's the Croson language.

Now, I think Professor Ayres and I have some substantial, if not perfect, agreement about

this. First, he has criticized the use of head counts as a simple measure of availability. If you look at the state and local disparity studies, that would wipe out about 50 percent of them. They're based on head counts.

He also suggests -- and I agree -- that there needs to be some capacity measure. I would probably take out about another 30 percent. We now have about 80 percent that we would agree with.

And he didn't say so, but I think he believes because that's the way the benchmark study is organized it should be categorized and the disparity should be examined by industry.

So if you ask that to be added, the use of SIC codes or the more modern NAIC codes, that would take out about another 18 percent. So there would be about two percent of the state and local disparity studies in the country that would be wiped out by those three requirements.

Secondly, they are frequently based on obsolete or incomplete data. If you read disparity studies, they oftentimes will tell you "We didn't really have the data to do this."

Thirdly, they report the data in ways that exaggerate disparities. Dr. Citro pointed out the

common apples and oranges comparison in disparity studies where they compare the numerical share of businesses with revenues and make no estimate of qualifications or capacity. And that will almost always be an exaggerated or misleading form of disparity. I would say about 80 percent of the state and local disparity studies make that error.

Fourth, they do not test to see if there are nondiscriminatory explanations for disparities. Once they get a disparity, the term "disparity" morphs into the term "discrimination." And, as Dr. Citro and I think Dr. Ayres would also agree, a disparity does not lead inevitably to the conclusion that it was caused by discrimination. It could be caused by a lot of things.

Fifth, they make findings of discrimination without ever identifying a single instance of discrimination or even a general source. And Dr. Citro mentioned that you need to really understand the procurement process. You might need to do case studies to locate some of the problems. I agree with that. I think simple statistical analysis may be very useful in pointing the direction to further identification of discrimination, but it isn't a total solution.

None of the other experts here have talked about anecdotal sections, which are very important in disparity studies. And I have a long section. I'm writing a law review article on that subject. I have a long section, and I'll just summarize the conclusions here.

The anecdotal sections base their conclusions on samples that are not gathered according to scientific methods. They base conclusions on a very small percentage of the survey universe. They fail to verify any allegation they report so that governments are left with a report that says there have been allegations. But there is no identification of who made the allegation. All the anecdotes are anonymous. And so governments then can either accept the conclusions that are not placed in a way that they can investigate.

The Commission's interest in this subject comes at a critical time. The benchmark study data is now almost a decade old. I believe its methodology is flawed. And, further, whatever the debate might be about that, the benchmark study does not have any indication of which particular racial and ethnic groups are suffering from disparities. It expresses disparities in terms of SDBs.

I think the law is pretty clear now that you have to find discrimination against particular racial and ethnic groups. You can't just have a composite finding.

Nevertheless, the benchmark study is the only supporting statistical predicate to narrowly tailored federal race-conscious contracting programs. The Department of Justice's 1996 appendix A is still being introduced by DOJ in the cases, but it was never based on original research and the secondary research it relied on is now old and some of it has been found not to be credible.

If it is true that the state and local disparity studies are overwhelmingly flawed, then the Urban Institute study cannot be correct either since it's all based on those state and local disparity studies. And, furthermore, its data is now ten or more years old.

Neither this Bush administration or recent Congresses have shown any interest in updating disparity analysis. And, as you heard, the recent attempt by the SBA to create a statistical basis for adding women to the 8(a) program has been found to be flawed.

Finally, a recent decision by the Ninth

Circuit, Western States versus Washington State Department of Transportation, has held that recipients of federal transportation dollars, highways, airports, transit systems, must have local evidence of contracting discrimination against specific groups before they can set race-conscious goals.

The Bush Justice Department has chosen not to appeal this decision. So it is going to be in place. That probably means a raft of new state and local disparity studies.

In short, it is predictable. The taxpayer investments in contracting disparity studies, controversy over the methods used in them and their judicial review, will go on for some time.

Guidance from the Commission about acceptable methodologies and roles for disparity studies would be a very important public service.

The last part of my report has to do with the consideration of race-neutral alternatives, which is an area where this Commission has already done important work. I'll simply list the area where I think the federal report that you have done can be modified to give guidance to state and local governments.

First, if there's a problem with the lack

of a well functioning complaint system, where claims of discrimination can be evaluated and remedied if valid; second, problems with communication about contracting opportunities; third, problems with discriminatory award of contracts; fourth, problems with the suppliers; fifth, problems with contract size; sixth, problems with binding and lending; seven, problems with the lack of a business plan or other skills to become a viable competitor for contracts. I believe there are race-neutral solutions to all of these things. And I have outlined them in my report.

Serious consideration of race-neutral solutions should not be an empty rhetorical ritual but should involve active problem identification and creative solutions, as the court instructed in Croson. Consistent with its advice in federal procurement after Adarand, the Commission should provide guidelines on serious consideration of race-neutral alternatives at the state and local level for contracting procedures.

Thank you.

CHAIRMAN REYNOLDS: Okay. I would like to thank the panelists. I think your presentations were enlightening. Before the commissioners start quizzing you, I would like to know if any of the panelists have

any questions or comments regarding something said by other panelists.

- Questions by Commissioners and Staff Director

DR. AYRES: Yes.

CHAIRMAN REYNOLDS: Yes, Dr. Ayres?

DR. AYRES: So it's just a small point, but the use of race-neutral alternatives would be a lot easier if the discrimination that was being remedied was government discrimination. If the government is discriminating and not getting the contract to the low bidder, that is real easy to remedy. Stop the government from doing that.

If government policies have disparate impacts and bond requirements, you can use race-neutral alternatives to get rid of those governmental induced disparate impacts.

And all of the examples that Dr. LaNoue and Mr. Clegg emphasized in race-neutral alternatives were directed at trying to remedy government discrimination.

The problem is that it's much, much harder to use race-neutral alternatives to remedy private discrimination and that the remedy to private discrimination that Justice O'Connor talked about was not -- if you can, of course, you get rid of the

discrimination.

But she talked expressly that a local government can use its spending power to eradicate the effects of discrimination. Even if you can't stop the discrimination itself, it is constitutionally authorized to use spending power to at least make it stop hurting.

CHAIRMAN REYNOLDS: Yes?

DR. LaNOUE: I would say two things. First, I was pleased to see that Dr. Ayres agrees that discrimination by government themselves, it is extremely likely that the problems are much more likely to be in the private sector. I certainly agree with that.

In the work that I have done, one of the things that I have been surprised at is how rarely have state and local governments prohibited discrimination in private contracting?

I think partly it's because it is a very complicated issue. For example, if an organization, let's say a religious organization, wants to have a new roof or a wing attached to its building and decides that it wants some member of the religious organization to do that, is that a form of discrimination and not to be prohibited? It shouldn't

be prohibited if a contractor continues to use the same subcontractor that he or she has been using over the years and has good experience with.

So the statutory problems are fairly complicated. I do think, however, it is possible to identify issues in the private sector and seek to remedy them with race-neutral means. I'll indicate two very briefly.

In the St. Petersburg disparity study that I worked on, two issues came up. One issue was that minority small businesses said that they were not given enough notice of contracting opportunities in the private sector.

In the public sector, that problem is pretty largely solved. Things are on Web sites. They're pretty available to anybody who is watching. But on the private sector, somebody builds a $10 million condo or something like that. How do you find that there were subcontracting opportunities?

I urge the city to use its zoning and licensing powers to say that above a certain threshold, if a private contractor wanted to get the city's approval to do this, that it had to agree to make subcontracting opportunities publicly available, to announce them so that everybody had access to those

opportunities.

A second issue had to do with lending. And we heard from a number of sources that small minority businesses were having trouble getting lending. I went to the banks, talked to bank officials about that. They said one of the problems was that these firms did not have enough experience in drawing up business plans.

I went to the Chamber of Commerce and said, "What can be done about this?" The Chamber of Commerce created a mentoring program for businesses that needed help in designing business plans.

Well, those are race-neutral alternatives. Are they perfect? Do they solve everything? No. But they are movement in the direction of creating opportunities if you have identified the problem. That's the key thing, to identify the problem.

CHAIRMAN REYNOLDS: Mr. Clegg?

MR. CLEGG: I agree with everything that Professor LaNoue said. I don't think that anything that I talked about or anything that Professor LaNoue talked about in terms of race-neutral alternatives would be limited to government discrimination.

And I think that, actually, the examples that we give of race-neutral alternatives and the

race-neutral alternatives that the Commission talked about in its report this fall are all things that can be applied to private discrimination as well as public discrimination.

CHAIRMAN REYNOLDS: Ms. Citro, any questions or comments?

DR. CITRO: I would just like to comment again on methodology data and methods. If you all are in the business or think that it would be useful to provide guidance to state and local governments for these kinds of disparity studies, I think you could make real service. And I think there is guidance that can be provided or studies that can meet reasonable tests that they are reasonably reliable and valid and so forth.

Again, a lot of it has to do with documentation, transparency, and trying alternatives. Instead of looking for one single disparity measure that's the golden grail of measuring, you know, availability in one particular method, you really get more robust results if you experiment with some variations, you try to look sensitively at, again, your industry classifications, your outliers in the federal situation.

For instance, I can well see -- I don't

know if this is true, but, say, take the Iraq war with some of those very big contracts. The data for these years are likely to -- those contracts may well swap some of the more regular level of contracting. So one would want to look at disparity measures with and without those contracts because to the extent that you get a range of measures that are telling you a consistent story.

And in the Urban Institute meta analysis, since our report was looking on women, that's what we looked at, they did a lot of sensitivity analysis. We did some more.

And the basic story for women-owned small businesses, while it didn't matter sort of how you -- which definitions of an available pool or what other things you were using, it tended to look like there were problems in these jurisdictions in this time period for women-owned small businesses.

On the other hand, if you get a variety of measures that give you different stories, then you know that instead of trying to defend to the death one particular measure, that you need to really look further back behind the data.

I will also say that I do think analysis in the federal government because there are now better

data sources available about federal contracting with the central contractor registration, with the latest survey of business ownership from the Census Bureau, and so on, where I think one could do some very credible studies and that those would not only be useful for trying to identify issues in federal contracting but could be useful as guidance for states and localities.

CHAIRMAN REYNOLDS: Okay. At this point I would like to open up the floor for questions from the commissioners. Vice Chair Thernstrom?

VICE CHAIRMAN THERNSTROM: I'll start. I'll start with Professor Ayres. I have really a lot of, actually, questions for everybody, but let's start with this one.

You focused on the Commerce Department's disparity studies. And I wonder how familiar with you are with the state and the local disparity studies that Professor LaNoue talked about. If you could identify any you think were well-done, poorly done? And tell us what standards you think should be required for state and local disparity studies related to availability, utilization, anecdotes. In other words, talk about those.

I'm also concerned about some other

questions raised about the Commerce Department's benchmark studies, what years they drew their data from. The question of how obsolete those data are now obviously was a very fast-moving landscape or a changing landscape in any case and, sort of as a broad question, how recent you think that economic data have to be in order to draw conclusions about current discrimination. The benchmark studies found disparities in some industries, not in others, even industries closely related. You know, could you talk about that, for instance?

Well, I'll stop there. I do have a bunch of other questions, but why don't I just stop there.

DR. AYRES: I do have some knowledge of state and local disparity studies. I've served as an expert in analyzing some of them. As I said in my written prepared comments, I've even given testimony suggesting, for example, in the F. Buddie Contracting vs. Cuyahoga Community College, that the benchmark there was not sufficient to provide even a prima facie case of narrow tailoring. That's referred to I believe on page 6 of my written comments.

And so I think that we do have a consensus but support the apples/oranges criticism as another way of stating that I think everyone on this panel

prefers a capacity approach to coming up with the benchmarking, and so to the extent that state and local have not done that.

I would put on one small caveat that there have been some state and locals that do a -- they use a kind of a qualified head counting. They try to capture a bit of capacity by putting the qualified firms into different categories of capacity: small, medium, and large. At least that's among the qualified firm counting approaches. Those would be superior.

Whether they are sufficient to provide a strong basis I don't have an opinion for you, but I do want to say I can imagine a version of qualified firm counting that at least is starting to respond to the apples and oranges problem, which I do take to be an important one.

Another big issue in disparity studies that comes up is the degree of aggregation or disaggregation. And here I just want to say that it is an issue that often cuts in two directions, that after you screen, if you disaggregate too far, it is likely that you will mask statistical evidence of discrimination.

And the simple metaphor here is if I had

1,000 coins and I flip each one of them once and I just look at each individual coin flip, I never can tell whether any of those individual coins is unfair, but if I look at 1,000 of them. So there are costs to disaggregation, but there are certainly costs that aggregation can mask or bias.

And so how it plays out in a particular case is going to turn on the specifics. So that is another issue that I think that reasonable people could differ on, is the degree of aggregation.

With regard to the question of how stale or how recent the data has to be in order to provide persuasive evidence, it turns a bit on the legal question of how far back the government can go and remedy a past discrimination. My sense of reading the case is that the Supreme Court will not allow the remedying of historical discrimination.

So there is certainly going to be a legal limit, but to my sense, if there is a date, if the law lets you go back so many years, let's say X years, then to go back more than -- and this is just a very crude response to you. But to give you an idea, to go back more than X plus five or X plus ten, to rely on data that's more than ten years old in the contracting setting would not provide a very reliable piece of

information.

And it's one of the reasons why, again, I think that government, even if it wants to solely rely on race-neutral means, should not go out of the business for testing whether there is discrimination. It should continue. It should mend, not end, disparity studies.

VICE CHAIRMAN THERNSTROM: Yes. I mean, ten years is a long time on the civil rights calendar since over every decade in this country in the last 50 years, there's been quite a bit of change in terms of the racial landscape.

Let me just ask one very general question to you, and then I'll let the microphone go and get back to the questions so that other people and others can have questions of you, if possible.

It seems to me there was a kind of bottom-line disagreement here between you and, let's say, Roger Clegg, who said a number of times -- and it seems to me this is getting at the essence of where the two of you depart.

Roger Clegg raised the question of whether it was a good idea to use more discrimination as a remedy for discrimination. And I assume that you would not agree with the characterization that

preferences in contracting or racial preferences in contracting or in any other area could be described as more discrimination and that that really is a dividing point between them.

DR. AYRES: I'm not uncomfortable with referring to race-conscious affirmative action programs as a form of racial disparate treatment. It's a kind of a literal discrimination in a very traditional sense.

But the normative framework that more discrimination is an inappropriate way of remedying other discrimination is one that I, like Justice O'Connor, disagree with that if you do it in a narrowly tailored fashion, that race-conscious spending can be normatively appropriate.

To tell you the truth, my beginning example of this is Marian Anderson. Marian Anderson was discriminated against by the Daughters of the American Revolution. And the United States government engaged in race-conscious affirmative action. They opened up the Lincoln Memorial because she had been a victim of past discrimination. And I think that that was constitutional.

MR. CLEGG: Let me say that that's a great example of a remedy that is not discriminatory. When

the federal government opened up the Lincoln Memorial, it did not then turn around and give Marian Anderson a preference because she was black or refuse to allow somebody to sing who was white. They were remedying a particular case of discrimination against an individual.

Now, if the federal government had a policy of protecting African Americans when they were discriminated against and not protecting Latinos or Asians or whites when they were discriminated against, that would be discrimination, but what happened with Marian Anderson I think was a wonderful thing for the federal government to do, but it was not discrimination.

CHAIRMAN REYNOLDS: Okay. Dr. LaNoue, do you have a comment?

DR. LaNOUE: Yes. I just wanted to comment on the way minority business programs actually work as applied to this issue. Essentially, whether it's the 8(a) program or state and local program, firms are certified as MBEs or MWBEs. And all they really need to do to be certified is to indicate what their racial, ethnic, or gender ownership is.

And sometimes they have to meet certain thresholds for the net worth of the owner, not always,

and sometimes for the size of the business. They do not actually have to show anything that would indicate they have ever been discriminated against.

And so a remedy that gives a preference to all firms owned by a particular racial or ethnic group, as opposed to firms owned by others -- and sometimes there are minority firms that end up on the losing side of this, too, because the disparity study hasn't shown that they're affected by any disparities. So they're on the outs, too.

That kind of a remedy, which affects any firm owned by a person of a particular group, because there is some statistical disparity seems to me quite over-broad. And if you don't have any evidence that particular firms have been discriminated against, then providing a preference to them, sometimes a preference that lasts decades -- and there are no ceilings on how many contracts you get through the preference. I think that's an over-broad remedy.

CHAIRMAN REYNOLDS: Commissioner Yaki, do you have any questions or comments?

COMMISSIONER YAKI: I thought Commissioner Thernstrom had other questions for other --

VICE CHAIRMAN THERNSTROM: I want to yield to you.

COMMISSIONER YAKI: Well, I'm trying to get my throat back.

CHAIRMAN REYNOLDS: Well, actually, before I go, the commissioners on the line, do you have any questions?

VICE CHAIRMAN THERNSTROM: I think we have lost the commissioners on the line.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIRMAN THERNSTROM: By the way, I have to say --

COMMISSIONER KIRSANOW: Mr. Chairman, I had my phone on mute so I wouldn't cough unnecessarily or anything. I apologize. This is Kirsanow.

One question that I have related to race-neutral alternatives, -- and I confess to being ignorant about this -- I have always been puzzled as to the vigor with which race-neutral alternatives are pursued by various contracting agencies.

In other words, in my very limited experience, although I will say that it's probably a little bit more than limited, I've never been able to discern precisely how much attention, if at all, contracting agencies pay to race-neutral alternatives that may be perfectly plausibly implemented.

And this is a question to anybody on the

panel but probably most appropriately to Mr. LaNoue. First, what is your experience in terms of how contracting agencies consider race-neutral alternatives? In other words, how much vigor is attached to their consideration of such alternatives?

And number two is, are there any guidelines that anyone on the panel would recommend as to the procedure with which race-neutral alternatives are considered by contracting agencies?

DR. LaNOUE: Thank you, Commissioner Kirsanow. I'll try to respond.

I think your generalization is quite correct. It is shocking that when a jurisdiction gets a disparity study that says there is some problem, the statistics show that there is under-utilization, that then almost always the first move is toward some sort of goals program and not to try to identify what the source of that problem is to see if there are race-neutral alternatives.

So it's commonplace that jurisdictions have no functioning complaint procedures for discrimination related to contracting. You would think that if they really thought they had some problem in discrimination, that they would at least try to have an operational complaint system.

Secondly, the politics of this situation is that race-neutral programs are not very sexy politically. A goals program that appears to be promising a certain amount of dollars to a certain constituency is a much more attractive alternative politically. And that usually is the first move by a jurisdiction.

CHAIRMAN REYNOLDS: Okay. I have a few questions for Dr. Citro. The first is -- well, I guess I have some questions and some comments.

DR. CITRO: Sure.

CHAIRMAN REYNOLDS: As a young lawyer, I was told by a senior partner that if I couldn't find an expert witness to say exactly what I wanted he or she to say that I shouldn't be in the business.

So when a municipality seeks out a company to put together a diversity study, well, I would assume that they have a number or a result in mind. The dispassionate type of analysis that you would find in the academy you will not necessarily find in the marketplace. And for me, that is a problem.

Also, my first question, do disparity studies determine whether private discrimination is current or historical?

And, finally, you mentioned the idea to do

more studies. And that will require funding. I suspect that that will require a great deal of funding to do it right. To do it right, you will need careful analysis. You'd have to use more than numbers.

I'm in the process now of helping my company build a coal-fired power plant, and we're letting contracts. The issues that are important to us that determine which bid we're going to accept, that information, at least based on the conversations that I've heard here today, that does not enter into the analysis. Who has experience building a super-critical boiler with a baghouse and an SCR? That type of information I believe is extremely important, but that type of information is rarely included in this type of analysis.

DR. CITRO: You are absolutely right in that point. First of all, no. A currently measured disparity is not going to, as I said, locate any possible discrimination in time, hour, and space in the sense of where is it occurring in either the contracting process or all of the processes that lead up to getting you a pool of ready, able, and willing vendors.

So disparity studies are really a starting point, not an ending point, in my view and the view of

our committee. And I agree with you that the kind of research program that would be needed would need to go beyond the statistical disparity studies, would need to involve case studies.

In the report we did about measuring racial discrimination, we were not talking about contracting. We talked a lot about the housing market and employment market and pointed out that in the employment market, there is a lot of statistical analysis now underway that takes -- there has been for decades -- a national survey, such as the current population survey, does a bunch of regressions, and puts in variables that might explain disparities. And then the residual that is unexplained will be taken as a measure that there must be discrimination against, you know, a certain group. And we point out the flaws in that approach.

And, again, to get really, really sound studies, one needs to probably have done the kind of case study that you're, in fact, talking about, where you're looking at specific kinds of businesses in that case looking at their hiring process, the criteria they're using, the decisions, et cetera, to then can inform a more robust statistical analysis.

You know, it comes down to what emphasis

our society wants to put on this. One could see, you know, the National Science Foundation, for instance, putting out the kind of research grants that would cover the kind of analysis that one would really like to have in this area.

I do think that, as I said, the federal government, the data that are available could well make it possible to do better, good research at less cost or at a cost that's sort of spread over the whole taxpayers, rather than what these individual states and localities would be doing on their own.

In reference to your first comment about how people pick the people who are going to do the disparity studies, that was one factor in the Urban Institute meta analysis. They did note I think there were about three firms that had done most of these studies. And they did do a sensitivity analysis to try to see whether that was making a difference. They didn't find that it did, but that doesn't mean that it wouldn't. And certainly in any guidelines that you or anyone else would put out, that should obviously I think be a factor that you don't want to prejudge your outcome.

I will say, though, on the Urban Institute meta analysis that Professor LaNoue has said

effectively, well, garbage in, garbage out. You put in lousy studies. And it doesn't matter how good your meta analysis is. And that is certainly a valid point, but the institute did screen studies. They threw out some where they couldn't figure out what had gone on or that didn't have enough number of contracts that were included in the study, several other criteria.

And with that, one can argue about whether they threw out enough of the really egregiously bad studies, but it is true that one purpose of meta analysis is to take studies none of which are individually totally strong and definitive and so on, but to try to save it by effectively combining data. You can learn, even if the individual data points are not as strong as you would like. You can learn something.

So their technique of meta analysis, while they could have done even more aspects of their analysis, sensitivity analysis, was not an unreasonable method to try to see if there are some nuggets in these very disparate state and local studies.

The problem now is those studies that they did the meta analysis on were all conducted in the

early '90s and used data that often were from the late '80s. And yes, the business world, particularly, for instance, women-owned small businesses, which was our focus, has been on this huge upward trajectory of growth. And so to have data that old to say anything about what is happening or not happening to them today, just, you know, you would have to look at new data.

CHAIRMAN REYNOLDS: Okay. One last question. I will be quick. This is addressed to Professor LaNoue. The federal government, is there any disparity study that's valid that the federal government relies upon to use racial classifications in the federal procurement process? I'm thinking of the '96 appendix, the meta-analysis, the benchmark study, or anything else that's out there that would support these programs.

DR. LaNOUE: Well, the easiest answer is that, even if they were at one point, they're now using data that is so obsolete that it has almost nothing to do with the current economy. So to base any racial preferences on studies using data from 1996 -- some of it is much earlier -- to award contracts today seems to me to be certainly not narrowly tailored and just flat-out unfair.

I have made detailed criticisms of the three federal studies in my report. I can go back over that. But, even if there was validity at one point, they no longer I think have any current validity. So the federal government is essentially awarding race-based contracts based on analyses that are 10-15 years old.

CHAIRMAN REYNOLDS: Okay. Thank you.

Professor Yaki, how is your throat doing?

COMMISSIONER YAKI: Better. Thank you very much, Mr. Chair. And thank you, panelists, for your time today.

First, I do want to note there are five Yale alumni at this briefing today. And I'm very proud of that fact. It shows the great diversity at Yale University, especially as I go to my next line of questioning.

I have a question first for Mr. Clegg. Mr. Clegg, you have been before us before. You were a witness I think at our briefing on the Voting Rights Act, where I know you expressed some concerns about I guess the section 5 reauthorization.

There are a couple of statements that you made that I would like to get your thoughts on. The first is a statement in your conclusion of your

written statement, the last paragraph, where you say "I doubt that a study can ever justify the use of racial or ethnic preferences to end the discrimination fad." Can you elaborate on what you mean by that?

In other words, you don't think ever, no matter what they find or what kind of data is there or whether Dr. Citro puts her stamp on it and says, "This is the best kind of data you could ever use," that shows past discrimination? You don't believe that racial and ethnic preferences should ever be used to remedy it?

MR. CLEGG: That's right. And I certainly am not saying that you could not do a disparity study that rigorously found evidence of discrimination. And I am certainly not denying that discrimination still exists in this country. I think we have made enormous progress, but certainly there are still instances of discrimination.

The question, though, when you go to the next step is whether the use of racial preferences to get rid of remaining discrimination is: a) constitutional; and b) a good idea. I think that as to the first question --

COMMISSIONER YAKI: Well, why isn't it a good idea? I think you and I would probably disagree

on the constitutionality. You have a different reading of Croson and Adarand than I do and probably than Professor Ayres does, but why is it never a good idea? That's what I am curious about.

MR. CLEGG: Well, I think one reason it's never a good idea is I think that in just about every instance, it is going to be unconstitutional. But even if you were able to identify some instance where, for instance, you had a recalcitrant discriminator and this seemed to be the only way to get at it, you have to consider not only the benefits of using racial preferences but also the costs. And the costs are enormous.

You know, you're abandoning the principle of nondiscrimination. You're getting governments into the business of treating citizens differently on the basis of their skin color or what country their national origins are.

You're telling somebody, the government is telling somebody, you know, "You're the best bidder for this contract, but you don't get the contract because you're the wrong color." That's a huge cost. I mean, it's a huge cost in human terms because, you know, you're being unfair to that individual. But it's also a cost in broader terms because you are, as

I say, abandoning the principle of nondiscrimination. You also create resentment. You stigmatize the people that you're supposedly helping by giving a preference.

COMMISSIONER YAKI: For example, let's take your employer X. And employer X wants to employ statisticians, hundreds of Dr. Citros, which would, quite frankly, boggle my imagination.

I'm talking to more of my friends who now tell me sheepishly that they flunked stat in college than ever before. I, on the other hand, steer carefully clear of that knowing that my pathway to law school could not hit a speed bump like statistics. So I am not going to claim any expertise in this area.

Let's take, for example, you are employer X who wants to employ 100 statisticians. And for 50 years, they've only employed white male statisticians, despite the fact that they only hire them from Yale University.

Now, Yale University, on the other hand, has been producing Dr. Citros by the boat load, lots of women Dr. Citros, black Dr. Citros, Asian Dr. Citros, of equal talent or even greater talent than that employer.

To me there is a tremendous societal cost

to the fact that those people, the women Dr. Citros, the African American Dr. Citros, the Asian Dr. Citros, are being deprived of the opportunity to compete and find a livelihood in company X, which has adopted a rigid white male-only Dr. Citro-like thing.

You know, when you talk -- and maybe it's just a difference of context. I don't know. But when you talk about the cost, I just can't imagine that part of the whole civil rights movement has been that discrimination has come at a great cost to this society in all ports of society, whether it was in professional sports and people like Satchel Paige were excluded from the Major Leagues or in other areas as well.

I am having difficulty understanding why there would not be a compelling interest at that point to say to that employer, "You have got to change who and what you do" and why you believe that to be an unconstitutional and unacceptable remedy.

MR. CLEGG: I think that telling the employer that they can no longer engage in the kind of discrimination that you describe would not only be constitutional. It would be something that I would support purely as a policy matter.

But that's not the question. The question

is whether the remedy for that discrimination -- and I agree that that discrimination should be remedied and that it can be remedied. The question is whether the remedy for that discrimination is to impose a quota on that employer and say that, you know, "Next year we don't want you to engage in nondiscrimination. We want you to hire X Asian Dr. Citros, Y Latino Dr. Citros, Z female Dr. Citros," et cetera. What the --

COMMISSIONER YAKI: Let's take that example because --

MR. CLEGG: Well, let me just finish. The order that should be given by a court when that company is sued under Title VII and the remedy that ought to be imposed is for that company to stop discriminating and to hire the best qualified people regardless of what their race or their ethnicity or their sex is.

COMMISSIONER YAKI: So what if company X only hires one Dr. Citro out of 100 or if they hire 2 or if they hire 3? I mean, part of the issue -- and it goes I think to the basic underpinnings of why we do disparity studies today and why I still think that it is useful as a civil rights remedy, as a societal remedy -- is to say, you know -- and it goes to the debate that we saw on the college campuses back in the

'60s. And it goes back to Brown versus Board in terms of whether or not an integrated society is inherently better than a segregated society. It says, you know, it's not just enough.

We can as a society stand back and say with lofty brow that we are founded upon the principles of equality for all people. We know that in 1787, that really wasn't the case. We know that in 1899, that really wasn't that case. We knew that in 1945, that really wasn't the case. And we knew in 1954, no matter what the Supreme Court ordered, that still wasn't going to be the case.

At some point in order to achieve the desired goal, at some point you have to quantify how it is that you go about I think, I believe, go about doing it.

We don't use the word "quotas" anymore. We use the word "goal." We use the word "targets." But the fact of the matter is that if you are trying to remedy a history of past discrimination in an industry and just say that company X has with its 100 white male Dr. Citros produced of them approximately 10 to 20 percent go off to become and found their own companies and everything like that, if we're not doing a good enough job in making company X really have a

diverse workforce and have real meaning to that, then the whole marketplace continues its chain from then on because we know that everything has an effect on everything else.

You just can't I think play this isolation game and say, "Well, you know, don't discriminate, race neutrality," blah blah blah blah blah blah blah blah blah. I mean, you and I can argue about the constitutionality or unconstitutionality of it or not, but you used the statement that "Racial preferences are used when there is no other way." That was your quote today.

MR. CLEGG: I don't know if I put it "no other way." In the Justice Department --

COMMISSIONER YAKI: But it's not really no other way. I mean, the Supreme Court in Grutter certainly didn't say, "no other way."

MR. CLEGG: Just so the --

COMMISSIONER YAKI: Justice O'Connor, you know, stated, "That does not require the exhaustion of every conceivable race-neutral alternative." I mean, that's not every other way.

I guess, you know, when I read --

MR. CLEGG: Why wouldn't you want to consider every other way before you engage in

something as divisive and unfair --

COMMISSIONER YAKI: Because, to be totally honest, Mr. Clegg, I believe that there are many clever public policy people, many clever lawyers, many clever politicians who can use the term "every other way" to mean an ad infinitum role of alternatives that will as a practical matter completely squash the opportunity to create what I think is a remedy of past discrimination.

And I note that from your testimony your center is very aggressive about this. You say that you contact many government actors and warn them of the divisive and unfair nature as well as the consequences of using racial and ethnic contracting preferences and urge that, instead, you adopt race-neutral alternatives. I mean, that is the point of the organization.

I just wanted to find out if you ever thought there could be any system that had a racial preference. And I guess the answer is just flat out no based on what you've said.

MR. CLEGG: It's very hard for me to imagine a situation in 2005 in the contracting context where the use of racial and ethnic preferences would make constitutional and policy sense, particularly

when you consider the inevitable costs --

COMMISSIONER YAKI: Well, I would think that --

MR. CLEGG: -- institutionalized racial discrimination has.

COMMISSIONER YAKI: I understand that is your point of view. I think that certainly there are a number of members of Congress on both sides of the aisle who might disagree with that based upon the incredibly poor response of the federal government with regard to Katrina relief and the contracts that were doled out there.

I call it the Halliburton effect, which is the inevitable black hole of contract dollar swallowing that goes on. But senators, such as Senator Snowe and others, have raised serious questions about whether or not even the programs that we currently have that promote and encourage the use of minority firms were for the most part in the aftermath of Katrina completely -- they were suspended. It was as if they never existed.

And it wasn't until congressional scrutiny came along that FEMA started taking those contracts back and thinking, "Oops. We need to do a better job of doing it."

And I just think that if you need an example of the fact that it's still out there, it still exists, and, boy, does it have a cost, you just need to look at one piece of the aftermath of the abysmal of federal response to Katrina; that is, the contracting for the rebuilding that went on afterwards?

MR. CLEGG: If contracting was being done on a crony basis, I think that it would be perfectly appropriate for Congress to intervene and say, "Look, this is wrong. And the government should be" -- particularly in light of the enormous costs that the federal government is going to be running to remedy the damage in Katrina, we need to make sure that the contracts are awarded not on the basis of who you know but on the basis of whether you can do the work at the least possible cost to the federal government so that our resources are not wasted and can be spent on helping the thousands of people whose lives were devastated by that hurricane.

But, you know, I said all of that without saying anything about giving preferences on the basis of race or ethnicity. There are plenty of white-owned companies and Asian-owned companies and so forth who are going to suffer if contracts are awarded on a

crony basis. And, conversely, there are plenty of African American-owned companies that are crony-connected as well.

So the remedy is not to set aside a certain number of contracts for African Americans and another set of contracts for whites. The solution is to stop awarding contracts on the basis of your political connections and to award it on the basis of whether you are the best-qualified companies.

COMMISSIONER YAKI: But I think that goes back to my example of company X, which is that if you had a filter mechanism that has led to the establishment of these kinds of companies that are dominated by non-minority, non-women executives and others, that I think it's a self-feeding creature, which is exactly why we have adopted, the Supreme Court has adopted, and continues to uphold the ability to use these kinds of race-conscious programs.

I think we're just going to have to disagree on that. I don't want to take up too much more time. I'd like to move on to Dr. LaNoue.

Dr. LaNoue, you apparently consulted on or read or did something on our Adarand study or Adarand report. I'm not quite sure what it was, but my question for you is that you said in your statement

that you do a lot of, in your written statement, that you do a lot of -- you have been a plaintiff's expert in cases involving disparity studies in Philadelphia; Columbus; Chicago; Cincinnati; Denver; Dade County; Cook County; Atlanta public schools; and Jackson, Mississippi.

Have you ever testified on behalf of a disparity study?

DR. LaNOUE: I've never been asked to.

COMMISSIONER YAKI: And have you testified against disparity studies that have been upheld in the courts, Concrete Works, for example? Does that ring a bell?

DR. LaNOUE: Concrete Works was found by the district court not to have -- the disparity studies in Concrete Works were found by the district court not to be valid. The Tenth Circuit overturned.

In Gross Seeds, the decision really doesn't turn very much I think on the quality of that disparity study. At least I wasn't able to testify much about that. It really turned much more on Congress prerogatives in this area.

COMMISSIONER YAKI: I mean, let's just put it out there on the table. You believe yourself to be -- would it be fair to characterize yourself as a

critic of disparity studies? I say that because, have you ever written in support of disparity studies? Forget testifying. Have you ever written a statement in support of a disparity study in X or Y or what have you?

DR. LaNOUE: Yes.

CHAIRMAN REYNOLDS: Okay. Which ones?

DR. LaNOUE: St. Petersburg study.

COMMISSIONER YAKI: Which you consulted on?

DR. LaNOUE: Which I consulted on.

COMMISSIONER YAKI: I'm talking about ones you didn't consult on. Did you ever write and say that "This was something that is appropriate" that you did not consult on?

DR. LaNOUE: The answer is no for the very reasons that I have expressed. Their availability measures are fundamentally flawed. They have made no attempt to gather their anecdotes in a scientific way or to verify anything.

If you accept those rather simple principles, which I think most social scientists would accept, then they're not valid.

COMMISSIONER YAKI: Well, I understand. I mean, you talk about availability of studies, what you

have. I mean, there is -- I would see if I can get a nod from Dr. Citro. It's very pleasant to be made an example of in many of my hypotheticals.

I would say that there is a fair amount of -- to do a very good comprehensive disparity study, I would suppose it would be helpful to have background in statistics perhaps or econometrics or regression analysis, sort of help weed things out like that? Would that be correct?

DR. CITRO: Yes, it would. And in looking for evaluating quality of data, I would certainly agree with Professor LaNoue that the existing disparity studies that are out there are generally quite weak in a number of ways, but I would not go so far as to say that you couldn't do a reasonably good study.

And, again, this partly gets to the question of which -- you know, you pick your contractor to give the answer. Part of that is a requirement that should be from the courts and everyone involved of transparency. You know, if someone else can come in and look at your data, then at least you've met that standard of reproducibility and transparency.

And one would hope that the level of

practice, quality of practice could rise in these studies, although, again, I think to help that, that if the federal government were to take seriously a responsibility to say, "Look, you know, it would really be good to do some solid research in this area," I will give an example in housing, of course. The federal government has done a tremendous amount of work in the field experiments that are done with paired testing, which we evaluated in our measuring racial discrimination report. And so it is not easy, but it is certainly possible to do good quality work.

To date, I would tend to agree that the vast majority of studies do have some serious problems.

CHAIRMAN REYNOLDS: Dr. Citro?

DR. CITRO: Yes?

CHAIRMAN REYNOLDS: When you said that they have flaws, would these flaws be fatal? Social scientists have high standards with respect to the validity and other such concepts.

Where I am going here is that there may be a reason why Dr. LaNoue has testified against so many of these disparity studies. If the overwhelming majority of these disparity studies are flawed, fatally flawed, then one would expect Dr. LaNoue or

any other dispassionate consultant to point out the fatal flaws.

DR. CITRO: Okay. So, again, your question is whether they are fatally flawed. We did not review the individual state and local studies, but based on what we did review in the Urban Institute analysis, that most of those studies did not do what I think is an essential thing in this area, which is that you try to look at multiple measures to see whether your estimate of a disparity is what the statisticians call robust to alternative data sets, definitions that you have treated a bit, et cetera, et cetera.

What the Urban Institute did for the help to support federal policy was say, "Look, we're throwing out a bunch of truly, you know, studies that we can't figure out what they did" or "what they did was abysmal. And they threw out something like, I think it was, 40 percent of the studies roughly that they looked at.

The others they felt met at least some minimal standards that the Urban Institute had set up. And from this meta analysis of pulling those studies together, they felt they were able to conclude that when you pulled them together, you looked for a

variety of different ways; for instance, you looked at studies that had been conducted by firm X versus firm Y, you did what is called sensitivity analysis, they did feel that sort of overall -- and, again, it was very strong for the women that, no matter how you looked at it, where you looked at it, it definitely looked to be a fairly big disparity.

Their study was to inform federal policy. If you're looking at an individual state or locality that's only got one study based on 20 contracts or something, you definitely have a problem there.

I think, as I say, the guidelines could help a lot that say, you know, "Look. Look at this in some different ways." One problem, of course, has to do, again, with data availability. And I honestly don't know what that is in various states and localities. Again, in the federal situation, there have been improvements in data that I think make it possible to do some good work. A federal study that is informing some general federal policy, of course, is not, again, particular to a specific locality.

So I would not set the standard that says, you know, you have to hire the National Academy of Sciences to do these studies in the state and local government, but I think the level of practice needs to

go up.

I think it can go up. The studies that were out there initially after Adarand were sort of the first. Everybody is sort of scrambling to get some work done.

I think we've learned something from that or we can learn something from that and that one could give guidance again to states and localities that said, "Look, you know, do some things. Be transparent. In particular, try to get some variability in how you're looking at things so, again, you can see whether -- because if variations give you the same results, then you can be more confident of those results than if you have just focused on one single measure that often can be critiqued."

DR. LaNOUE: Let me just add a very small point to that.

CHAIRMAN REYNOLDS: Sure.

DR. LaNOUE: Universities, the academic community has been kind of AWOL on this. Almost all major research universities have centers that do public policy research. And you can find a handful, I mean, just a tiny fraction of these in which universities have done them.

And if universities do them, you have some

kinds of quality control that you don't have when consulting companies, which do studies after study for governments -- what causes a government to pay $800,000 for a study? What is it they hope to get?

Well, usually it's because there's some political pressure to have a race-based program. And the consultants know that. We had an interesting example very recently in New Jersey where the documents became public -- they're usually not public -- where one of the consulting companies wrote a letter and said, "You know, if we hand in our disparity study as the numbers now look, there will be a disparity for African Americans but not for Hispanics and women." And we know that would be politically unacceptable. They have now gone back to the drawing boards to create a different result.

So I think that Dr. Citro is right that it's not only a matter of more carefully specified standards. I think different people have to do it.

CHAIRMAN REYNOLDS: Dr. Ayres?

DR. AYRES: Just to say I'm worried about Dr. Citro's concerns with the Commerce study. Those concerns are in a very different basis than many of the other studies, which show you characterize this potentially fatally flawed.

Dr. Citro said with regard to Commerce that there was a problem with both the transparency and the documentation of the Commerce study and with regard to multiple measures. I don't want to completely disagree, but I think it's actually slightly better than you said.

Again, we're in agreement on transparency, but it's to the extent feasible. I personally, whenever I can, put the raw data on any empirical study I do.

With regard to Commerce, it violates census rules to put some of the wrong data.

DR. CITRO: That's true. That's true.

DR. AYRES: So you can't do that. But you could go further in documentation and in releasing the regression coefficients. And I would call upon Commerce right now to reveal the documentation in a broad public way and the regression coefficients from the past studies, even if they don't do new studies, at least release what they have from the old studies.

Even there, the state of the world is slightly better than I think you characterized. In two different cases, regression coefficients were released and documentation was released. And it's on the public record if someone goes to those cases.

And so it's understandable that you did not, but, indeed, Professor LaNoue referred to some of that evidence that is available if one digs hard enough.

Part of the problem is you have to dig too hard. And, secondly, there is even some evidence of multiple measures. But, again, this should be open to the world. And still I favor a robust estimation with multiple measures. And more can be done on that than mentioned as well.

MR. CLEGG: Mr. Chairman, if I could just add to part of my exchange with Commissioner Yaki? The political pressure that is inevitably brought to bear and Professor LaNoue has talked about and that is frequently reported, I remember early on a front page article in the Wall Street Journal -- this was right after Croson -- where the City of Miami I think had asked one of the Big Six accounting firms to do a disparity study.

And I think at that time the word hadn't really gotten out as to what these disparity studies were for. And the poor accountant came back and was testifying before the Miami city council and thought he was giving them good news that he had found that there was no discrimination, in fact. And he was

quickly uprooted by the Miami city council member who said, you know, "That is not what you were supposed to find."

Anyway, the point is that the inevitable political pressure that is brought to bear is another reason why I am so categorical in saying that I think that the use of racial and ethnic preferences is just not a good idea because it's very difficult to remove the process from that political crucible. That makes it I think much better to use race-neutral alternatives.

DR. LaNOUE: That accounting firm was Pete Marwick. And that was their first and only disparity study. They got out of the business after that experience.

CHAIRMAN REYNOLDS: Okay. Mr. Clegg, I just want to follow up on your statement, at least your exchange with Commissioner Yaki. While I don't go as far as you do in terms of categorical, just an across-the-board prohibition of the use of racial classifications, I do believe --

MR. CLEGG: The contract in context.

CHAIRMAN REYNOLDS: Yes. I do believe, though, that there is a constitutional presumption that the use of any racial classification is illegal,

that the state or state, local, or federal agency that is using racial classification has the burden of proving that there is a compelling state interest.

But there is another interesting -- you know, when I think about this notion of I guess fairness, most of the nation's history, we have used racial preferences.

There were about 15 minutes somewhere in the '50s or '60s where the nation got together and said it was a bad thing, that we shouldn't engage, that the government should not use racial preferences, shouldn't distribute benefits and burdens amongst its citizens on the basis of race. I think that those 15 minutes, that was the golden age in the country in terms of race.

No one likes to lose a contract or a seat at a selected university or anything based on their race. And I think that race is divisive. And I also think that it's important when the government approaches these issues, that the government approaches these issues with clean hands.

I think that yes, we all make decisions, some good, some bad, some based on race, but the government should set an example. The government should be an exemplar for us. The government should

show us what we should be doing and how we should be living our lives. So that's another reason I think that the use of racial classification is -- I'll be gentle and just say problematic.

Now, after saying all of that, Dr. Ayres, is there anything, any specific argument or piece of data contained in Professor LaNoue's write-up that you disagree with? Is there a fundamental flaw contained in his write-up that you can point out?

DR. AYRES: Yes. So one of his main criticisms of the Commerce study is the inclusion of 8(a) firms as ready, willing, and able. And I think that his criticism is overstated for two reasons. One, these 8(a) firms had to go through a certification that they were ready, willing, and able to contract, but one could be skeptical about whether the SBA was doing a good job.

The more important reason that is of concern, is overqualified, again goes back to the capacity approach used by the Commerce Department if the concern here is that there were a bunch of 8(a) firms that really were not ready, willing, and able and that were included to inflate the availability percentage, but the capacity approach would attribute very little capacity to a firm that had no payroll in

recent years or very small payroll or had only been in existence for a very short time.

And so the capacity approach has great benefits in carving out 8(a) firms that weren't, in fact -- even if you don't trust the SBA certification, the capacity approach had a greater way of limiting and conservatively estimating their ready, willingness, and able.

And the second approach -- and this goes both I guess to a broader disagreement that I have with both Dr. LaNoue and Mr. Clegg. And it is on whether it is appropriate to require individualized evidence that the beneficiaries of race-conscious preferences were individually harmed by disparate treatment and whether you have to identify individual instances of disparate treatment. And the problem here is this leads to an extreme kind of limit.

Disaggregation is of the following kind. You look at not just an individual minority contractor but an individual minority contractor on an individual contract. And that's your denominator of one, and your numerator is either zero or one. They either got the contract or they didn't.

And if there is in a sense a plausible view, well, that is the extreme and most powerful

evidence of discrimination. But if you require that level of evidence, you cannot run any kind of a macro remedy. And given the nation's ongoing history of race discrimination, to make that kind of a demand is, in effect, a demand that race-conscious remedies be fatal, in fact?

CHAIRMAN REYNOLDS: Okay. At the beginning, I tried to get the panelists to engage each other's work. And that last question was my pointed attempt. So, Dr. LaNoue, would you care to respond?

DR. LaNOUE: Well, the issue of what was the effect of including 8(a) firms in the benchmark study, let me talk about that first. The benchmark study used as a measure of availability first firms that actually bid in a number of federal procurement situations.

I agree with that. I think that's a fair measure of availability. Those firms that actually bid were clearly willing. You don't waste the time and effort to bid if you're not qualified or don't think you have the ability to do the work. In a small fraction of cases --

CHAIRMAN REYNOLDS: Why don't you?

DR. LaNOUE: Why don't you?

CHAIRMAN REYNOLDS: Yes. If you have gone

to banks and discovered that one of the issues was the lack of a business plan, that suggests that there may be disparity of knowledge. One group or at least a higher percentage of a particular group understands what is required of a process and a little percentage of a particular group lacks this knowledge.

So they go and they submit their bid without knowing all of the hoops that you need to jump through. So I just want to push it back a little bit.

DR. LaNOUE: That's a fair question. I would never say that businesses are equally knowledgeable about this or that every business puts together a serious bid, but if you're going to survive in the business very long.

You learn that submitting a serious bid is a major enterprise in terms of time and effort and cost. And if you keep doing that frivolously, you're not going to survive.

So firms that are successful think long and hard about when to submit bids because it's bad if you submit it and lose, it's bad if you submit it and you win and you haven't priced it properly and you lose money on it. So that's a careful enterprise that successful businesses engage in.

CHAIRMAN REYNOLDS: But in your write-up,

you talk about the fact that minority firms are often newer firms, have less experience. You put that together with the fact that most small businesses sink within seven, eight years, it just seems to me in my limited experience with the contracting process, there are just a whole lot of qualitative issues that are just not factored into disparity studies.

Well, arguably, the only way to do it right is to do a case study. And I think there are huge transaction costs to doing that. I think that to do it right, you have to learn the company. You have to get in there and break it apart and see how this complicated machine works to find out the personalities, to find out whether price is really the paramount issue or whether getting that coal fire power plant built on time is the critical issue.

This is just, I guess, a few examples, but there are millions of examples of millions of issues out there that need to be taken into account. And while I agree that it is possible to do a disparity study, one that is a better measure of discrimination, looking at the documents, at least the ones that the federal government is relying on today, they didn't take the approach that I'm thinking about and the one that Dr. Citro recommended.

So, anyway, these are mostly comments. And so, you know, respond, if you will. If not --

DR. LaNOUE: I finished my answer, but --

CHAIRMAN REYNOLDS: Okay.

DR. LaNOUE: There were three databases from the benchmark study. The firms had been -- I'm fine with that. I think that's useful. It's not pertinent, but I think you can fairly say that if a firm bids, it believes it's qualified, willing, and able, and the number of bid disqualifications are very small: one, two percent.

The second category were firms that received source contracts. And somebody in the government thought they were qualified, willing, and able.

The third category were firms that were 8(a) firms that simply are on a list. If they had bid on a contract, they would have already been included. If they had received a sole source contract, they would have already been included. But by adding a group of firms that had neither bid nor received the sole source contract, they were simply on the 8(a) list, you are adding a group of firms who may not be qualified for any government contract that was actually offered or may not have actually been willing

to compete for any government contract in the time frame we're looking at.

Now, Dr. Ayres said that that probably didn't make very much difference because the capacity measures would have reduced the impact of simply adding these 8(a) firms. That may be true, but I don't think that's ever been specified.

It is very difficult to find out how many 8(a) firms were actually added and very difficult to find out what their ultimate impact was on capacity ratios. There are some capacity measures in the benchmark study that just don't seem plausible. So something seems to be going on there.

There's one category in which small, disadvantaged businesses are classified as 80 percent of the capacity. I think it's the food industry. So, unfortunately, the underlying data has really never been released in such a way that somebody could go back through it and really do reanalysis. And so we don't know what the impact of the 8(a) firms would be.

But I think mixing firms that are simply on a list with firms that have actually received contracts for a bid is really an apples and oranges mixture.

CHAIRMAN REYNOLDS: Thank you.

Vice Chair Thernstrom?

MR. CLEGG: Could I just say also in response to Professor Ayres that I think that the case law is pretty clear that to some degree, you have to have microeconomic evidence in a macroeconomic setting, to paraphrase Dr. Ayres, because the Supreme Court has said that simply, you know, pointing to societal discrimination is not enough to justify the use of racial and ethnic preferences. And I think he would agree that certainly the best evidence of discrimination is very case-specific.

Now, it may be that that is not always possible. And I wouldn't say and I don't think that I said that you always had to be able to prove that this individual did not get this contract because of race. I don't think that you have to have that degree of smoking gun evidence.

I think that you have to at least -- well, you can't ignore evidence that there might be some reason other than race that somebody didn't get the contract. And I think you also have to be aggressive and creative in asking when you do one of these studies if there might not be some reason other than race or ethnicity. And if there are obvious explanations that suggest themselves, you have to

investigate them, too.

CHAIRMAN REYNOLDS: Do disparity studies look at similarly situated white contractors? Is there a comparison between similarly situated black and white contractors bidding on federal contracts to see the rates of success between the two?

DR. CITRO: Well, it's by inference. If it's, say, minorities or women, that you're looking at their share of contracts and their share of whatever pool you can find that is ready, willing, and able.

And some of the state and local disparity studies had broken it down by specific groups. I think I remember that in the Urban Institute analysis.

I do think there is more room for given the very skewed size distribution of businesses for looking within sort of categories of contract amounts, say, or looking -- for instance, I have not seen usually studies that look at, say, small minority businesses versus other small businesses. It's usually small minority businesses versus, you know, everybody else that's in your pool.

Again, this is saying to look at the data in more ways, but I would want to correct an impression when I say that, yes, case studies are very useful to inform this. But obviously doing a case

study of every business in a jurisdiction is not possible.

It's an iterative thing where you have got a statistical analysis that suggests that there is an issue here. You want to understand perhaps what's behind it. And then you go out and see if you can get case studies.

I mean, it would be an impossible standard to have to understand -- what was it? -- your boiler contracting process in and of itself, but, on the other hand, too many statistical analyses, whether it's in contracting, employment, or housing, are just sort of throwing data into the pot in an aggregate way without trying to figure out what is going on in the process of hiring or housing rental or here federal contracting that you're trying to understand, so all of which is partly to say why scientists' opinions are often frustrating is that it says that, you know, there's no holy grail here of you do it just this way and you've got a perfect study. That's just not there. It's --

DR. LaNOUE: Could I add to Dr. Citro's comment or to the question of looking at bid success rates? If that is defined as examining whether, say, women-owned businesses are successful on 30 percent of

their bids and white male-owned businesses are successful on 35 or 25 percent of their bids, that kind of analysis is almost never done. I've done it as an expert, but in disparity studies, it's never done.

It would be one useful, not the only, one useful way of doing an analysis because it might tell us some things. Let's say some group bids fairly frequently but is not very successful. What's the reason for that? The reason might be that they don't have very good estimating skills, that there is some training problem that could be involved here that could be addressed.

The reasons could be that they're paying too much for supplies or labor. And we need to understand what that might mean or it is possible, theoretically possible -- I've never seen it -- that in the low bid system, there's some sort of systematic discrimination against the bidders of a particular race or ethnic group.

But examining bid success rates would be one of the ways to go about doing this.

CHAIRMAN REYNOLDS: Dr. Ayres?

DR. AYRES: I again think that there was some agreement on the panel that at the end of the

day, that even the best disparity study, if it's going to be done in support of a broad government affirmative action program will exclude some variables that might provide alternative rationales that, again, a finding of disparity is not necessarily evidence of discrimination.

Because of that, it is going to be -- and I think that I support your group chair that you're going to need additional pieces of evidence to try to bring you across the line if you're going to believe that this is narrowly tailored.

The anecdotal evidence if it is properly acquired and if it has other indicia of credibility is one type of evidence. In some ways, I would like to say this is another version. Dr. Citro said that we should have multiple measures of availability. We should also have multiple measures of discrimination, not just the anecdotal and the case studies.

With regard to the case studies, I would throw in industry case studies of supplier industries. And here's the place where the academy has not been completely sitting on the sideline.

There have been many studies, for example, of the credit industry and the difficulties that minority and women-owned firms have in obtaining

credit, but just to throw in another type of evidence, and that is toward more broad, general societal evidence of discrimination. Two that seem to me that would be relevant in many of these studies is one is the very recent and powerful resume test, where a couple of researchers send out resumes that were identical. Some had African American-sounding names. Another had Caucasian-sounding names.

This is a randomized study. It's the gold standard of social science. They found that firms were much more likely to respond to names that had more of a Caucasian cadence than an African American cadence.

These are the same firms that are often supplying influence or being potential customers of minority firms. And it is a piece of evidence. And I would say it would never by itself be controlling to take me across the line from disparity to discrimination, but it certainly would be probative.

Another broad piece of societal information is the accumulating and I think powerful evidence of unconscious racial bias that is coming out of the work of Mahzarin Benaji, and Claude Steele in internet tests that people can do in just a few minutes.

They cannot keep themselves from engaging in disparate treatment in a very simple sorting experiment with regard to photographs. And so you have evidence that there still is lingering unconscious racial bias in society at large. You have evidence that the very firms that we're worried about are engaging in disparate treatment in other contexts.

Those things, added together with case studies and anecdotal evidence, are the kinds of things that I think social scientists -- it's a kind of a concilience, to use a fancy word, that should at least be considered and if it's strong enough might take us across the line.

MR. CLEGG: John McWhorter has a book coming out next month that talks about some of the studies that Professor Ayres has cited and points out some of the problems in them.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRMAN THERNSTROM: Yes. And, actually, Professor Amy Wax, Professor, University of Pennsylvania Law School, had a very good piece on Benaji's work recently. It was just an op ed., long op ed., in the Wall Street Journal, but it did hit the kind of major points of the problems of getting at this so-called unconscious racial bias on the basis of

flashes of photographs. I, frankly, would not put her work in the category of social science, but, in any case, that's a topic for another day.

Okay. The hour is getting late. So just a few questions. One clarification. I suspect that, Roger Clegg, what you said in terms of Asian over-representation in institutions of higher education, while at the same time there being discrimination, for the record, needs a little clarification.

That is, you can have 50 percent, as you do, at Berkeley and UCLA of the student body, undergraduate student body, as Asian American in a state that's only 10 percent. Nevertheless, you can't have a ceiling on Asian American acceptances. And I just for the record wanted to clarify that point.

MR. CLEGG: That is precisely my point, that over-representation doesn't necessarily mean that a group is not being discriminated again.

VICE CHAIRMAN THERNSTROM: Well, exactly, but I just wanted to bring that point out since you made it very cryptically.

You said -- this is again for Roger Clegg -- there is a special problem of subjectivity in the area of contracting.

MR. CLEGG: No. Just like I said, it's just the opposite. I think that the subjectivity is more of a problem in the employment context and the university context.

VICE CHAIRMAN THERNSTROM: Okay. Because I was about to argue with you about that. I'm glad to have that clarified.

Actually, I'm going to argue with Roger Clegg a little bit on race-conscious remedies, but I wouldn't use the example of the contracting area, race-conscious remedies never being appropriate to bust a system open.

And I would point in the voting rights area to rural counties in the south where you can take a racial census before the election and you know the outcome.

These counties are extremely hard to find today. They certainly existed yesterday where if you did not start some kind of race-conscious districting in a county, rural county, it was substantial. In the population, you were never going to get a black face in office.

There are exceptions. And so I would disagree with him on -- I am allowed to argue with Roger Clegg.

MR. CLEGG: Although I don't think we're disagreeing because I limited what I said to the contracts in 2005.

VICE CHAIRMAN THERNSTROM: Absolutely. You bandied about the word and we have been kind of using the word "race-neutral" here a number of times this morning. What qualifies as a race-neutral program?

Let me give you an example that doesn't involve contracting but does involve the world of entrepreneurship, as it were. The Institute for Justice has a clinic helping entrepreneurs on the south side of Chicago get on their feet. This is really helping them get through the regulatory maze of the City of Chicago.

Now, because the clinic is based on the south side of Chicago and they did that purposely, knowing what the target group had to be, is that race-neutral or is that race-conscious?

MR. CLEGG: Well, that's a very interesting question. I think that if you adopt a measure or have a set of criteria that disproportionately are going to include African Americans, for instance, for the same reason that I don't think it's discrimination just because a neutral

measure excludes this or that group, I don't think that there is a problem if that measure, necessarily a problem if that measure, disproportionately includes a particular group.

I certainly would require, at a minimum, that when you do that, that any measure to be race-neutral not turn away anyone simply because of race or ethnicity.

There are poor white folks on the south side of Chicago. And if they walk into the Institute for Justice's door, I would assume that they would be allowed to participate in the program, even if they're not --

VICE CHAIRMAN THERNSTROM: Which they are, of course.

MR. CLEGG: Which is fine. Now --

DR. AYRES: Could I respond?

MR. CLEGG: I was just going to continue. I think that there is -- I don't like it when criteria are chosen, even racially neutral criteria are chosen, with an eye on race.

That is, for instance, suppose that an employer decided that he was going to require a high school diploma for his janitors precisely because he knew that that would exclude African Americans

disproportionately. That's discrimination. And I think that if you choose criteria with an eye on race, that that is problematic.

That said, it is certainly, you know, less problematic. For instance, when Texas adopted a ten percent plan, that was better than having overt racial preferences, even though it was clear from the legislative history that this ten percent plan was adopted, in large part, because of race and ethnicity.

I'm not sure that you really have that problem in the contracting area. I mean, the race-neutral alternatives that the Commission talked about and that Dr. LaNoue and I have talked about I think are chosen not because they're going to help or hurt this or that racial or ethnic group but because of the fact that they are going to get rid of discrimination or get rid of irrational contracting practices.

You know, if there is an irrational contracting practice that happens to be excluding white firms or Asian firms, I think that it should be gotten rid of as well.

DR. AYRES: And just constitutionally, that dichotomy is not between race-neutral and race-conscious but between race-neutral and

race-contingent. And, indeed, Justice O'Connor says the Constitution requires that we prefer race-neutral but race-conscious. Her memorable phrase was race-neutral policies to enhance minority participation have to be considered. And so since she essentially was talking about to enhance minority participation. She is constitutionally preferring race-conscious but not race-contingent interventions.

MR. CLEGG: I think it's tricky. It's certainly true that she said that. And I think that is actually intentioned with other Supreme Court decisions, where the court has said that something that is racially neutral but is adopted with discriminatory intent does trigger a strict scrutiny.

For instance, in the voting context, Alabama adopted a rule that disenfranchised individuals who committed certain misdemeanors. And it was clear that this was adopted in the Jim Crow era with the idea of disenfranchising African Americans. The Supreme Court rightly, you know, struck that down.

But Professor Ayres is quite correct that -- and I actually think there is some tension between that line in Croson and what I think is the weight of the Supreme Court's jurisprudence that when you adopt, even a racially neutral measure, -- a grandfather

clause, for instance, is another example or in the Title VII context employment criteria -- if you adopt them with an eye on race, you know, to help or hurt this or that racial or ethnic group, you are engaging in the use of a phrase that would trigger strict scrutiny.

DR. AYRES: And I agree that there is this important tension. This seems to be a place where Justice O'Connor, notwithstanding her emphasis on symmetry, when it comes to race-neutral but race-conscious government action, seems to depart from her symmetry principle.

MR. CLEGG: She's leaving.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom, do you have other comments or questions?

VICE CHAIRMAN THERNSTROM: Two fast ones or are we out of time? I can cut it off.

CHAIRMAN REYNOLDS: Commissioner Yaki and I are suffering, but --

(Laughter.)

VICE CHAIRMAN THERNSTROM: One. I can cut it off.

COMMISSIONER YAKI: We're just going to breathe on you in about a minute.

(Laughter.)

VICE CHAIRMAN THERNSTROM: All right. Two fast ones, then. I look at the occupational landscape. And this has a lot of bearing on contracting as well. You know, this has been made explicit today. Groups cluster, not simply the standard racial and ethnic groups, but, you know, when you're talking about Armenians, whatever, Jews.

I mean, Thomas Sills' favorite example is the complete dominance of Cambodians in the doughnut-manufacturing business in Los Angeles. And I do think it needs to be made explicit that when you're looking at disparities, they become the demographic landscape of kind of ethnic, national origin group, et cetera, choices that are being made have got to be factored in.

Anyway, that's just a comment. Last comment, Commissioner Yaki, in your comments, it seemed to me that --

COMMISSIONER YAKI: So we're not getting out of here any time soon.

(Laughter.)

VICE CHAIRMAN THERNSTROM: We are. We are. I won't be surviving very long.

COMMISSIONER YAKI: I'm a nonviolent person.

VICE CHAIRMAN THERNSTROM: It did seem to me that there was an assumption that the market did not operate and contracting -- and it would extend to hiring as well -- that companies or the bottom line in a very competitive market environment didn't operate so that there was every incentive to hire the people who could do the job best.

Now, that, of course, was precisely the situation in the Jim Crow south where you had bus companies, railroad companies, and so forth, losing gobs of money because of their education policies. And it simply wasn't possible to rationally operate as a business in that climate.

But it does seem to me that you are underestimating today -- but correct me if I'm wrong -- underestimating the -- he's smiling over there -- underestimating the degree to which the market operates.

CHAIRMAN REYNOLDS: Well, he chooses not to respond to this comment. We can go home now.

COMMISSIONER YAKI: Okay. Very briefly. I don't choose to underestimate the way to which the market operates. The contrary, I very cynically believe that the market operates according to a set of principles that are not always market-market-driven.

I think that the evidence of continued unconscious racial disparity still exists. I think that in my own professional experiences, that glass ceilings still and continue to provide effective barriers to many minorities for advancement in the "competitive marketplace."

I believe that as much as we want to say that we have driven away all the vestiges of discrimination, as should be our hope and should be our goal for the past 200 and I would say, you know, even beyond that years in our society and our culture, there still remains that taint.

And I think part of the reason that I am on this Commission is to work as hard as I can to ensure that that taint and stain is removed as much as possible. And that is my viewpoint.

And, you know, I very much appreciate the viewpoints from which all of our panelists came from. It comes from a desire to have a better country, one where race is not a factor, where values can be had in a race-neutral setting, but I'm not going to kid myself in thinking that we're there quite yet.

VICE CHAIRMAN THERNSTROM: Well, look, I do not want to be characterized as somebody who believes that we are beyond race.

COMMISSIONER YAKI: But you asked the question.

(Laughter.)

VICE CHAIRMAN THERNSTROM: For the record, I would never argue we are beyond the point of racial discrimination in this country. Of course, we're not beyond that. We have gone very far down the road and made enormous progress in the last half century. We're not at the end of that road.

CHAIRMAN REYNOLDS: Okay. I'd like to thank the panelists.

(Laughter.)

CHAIRMAN REYNOLDS: I think that you all did a wonderful job. You came at it from different perspectives. I also appreciate the civility and the professionalism in which this discussion took place. These are issues that while they generate a lot of emotion and everyone here today conducted themselves as professionals, disagreeing but in an agreeable manner. Thank you.

VICE CHAIRMAN THERNSTROM: I second that. Much appreciated, everybody.

(Whereupon, the foregoing matter was concluded at 12:30 p.m.)